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EDITOR'S NOTE

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No. 86-472-CFX
Status: GRANTED

Title: Church of Scientology of California, Petitioner
v.
Internal Revenue Service

Docketed:
September 23, 1986

Court: United States Court of Appeals for the District of Columbia Circuit

Counsel for petitioner: Seefried,Robert A., Lieberman,Eric M., Hertzberg,Michael Lee

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Aug 8 1986		Application for extension of time to file petition and order granting same until September 24, 1986 (White, August 13, 1986).
2	Sep 23 1986	G	Petition for writ of certiorari filed.
4	Oct 23 1986		Order extending time to file response to petition until November 26, 1986.
5	Nov 26 1986		Order further extending time to file response to petition until December 26, 1986.
6	Dec 31 1986		Brief of respondent IRS filed.
7	Jan 7 1987		DISTRIBUTED. January 23, 1987
8	Jan 27 1987		Petition GRANTED. Justice Brennan and Justice Scalia OUT.
			**********
10	Feb 20 1987		Order extending time to file brief of petitioner on the merits until April 13, 1987.
12	Mar 4 1987		Record filed.
13	Mar 4 1987		Certified copy of original record and proceedings, 3 boxes, 2 boxes under seal received.
14	Apr 2 1987		Order further extending time to file brief of petitioner on the merits until April 27, 1987.
15	Apr 27 1987		Brief amicus curiae of John L. Neufeld, et al. filed.
16	Apr 27 1987		Joint appendix filed.
17	Apr 27 1987		Brief of petitioner Church of Scientology of CA filed.
18	Apr 27 1987		Brief amicus curiae of ACLU, et al. filed.
20	May 27 1987		Order extending time to file brief of respondent on the merits until June 29, 1987.
21	Jun 29 1987		Order further extending time to file brief of respondent on the merits until July 3, 1987.
22	Jul 2 1987		Brief of respondent IRS filed.
23	Jul 17 1987		CIRCULATED.
24	Jul 20 1987		SET FOR ARGUMENT. Monday, October 5, 1987. (4th case).
25	Sep 14 1987	X	Reply brief of petitioner Church of Scientology filed.
26	Oct 5 1987		ARGUED.

PETITION FOR WRIT OF CERTIORARI

86-472

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
Petitioner,

vs.

INTERNAL REVENUE SERVICE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT A. SEEFRIED

Robert A. Seefried, P.C.
Suite 600
1718 Connecticut Ave., N.W.
Washington, D.C. 20009
(202) 745-7757

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether or not the IRS, in response to a Freedom of Information Act request, may, pursuant to 26 U.S.C. § 6103(b)(2), refuse to disclose reasonably segregable portions of records which cannot be associated with or otherwise identify a particular taxpayer, unless the information has been "reformulated."

2. Whether or not 26 U.S.C. § 6103 was intended by Congress to shield from public disclosure IRS records sought under the Freedom of Information Act that do not identify or otherwise infringe upon the privacy interests of any taxpayer.

LIST OF PARTIES

The parties to the proceedings below were the petitioner Church of Scientology of California and the respondent Internal Revenue Service.

Petitioner Church of Scientology of California has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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OPINIONS BELOW

On May 27, 1986, the Court of Appeals for the District of Columbia Circuit entered two separate opinions in the above-titled proceeding. The panel opinion is reported at 792 F.2d 146 and is reprinted in the appendix hereto, (App. 24a). The *en banc* opinion is reported at 792 F.2d 153 and is reprinted in the appendix hereto, (App. 38a). A subsequent amendment of the *en banc* opinion issued by the court on July 11, 1986, has not yet been reported and is reprinted in the appendix hereto, (App. 90a).

The opinion of the District Court is reported at 569 F. Supp. 1165, and is reprinted in the appendix, (App. 1a).

JURISDICTION

Petitioner brought this suit in the United States District Court for the District of Columbia pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (a)(4)(B). On June 24, 1983, summary judgment was granted on behalf of respondent. (App. 1a).

The panel judgment of the Court of Appeals for the District of Columbia Circuit was entered on May 27, 1986, reversing the decision of the District Court. On the same day, an *en banc* opinion was issued by the court of appeals.

On August 12, 1986, Justice White ordered that the time for filing this petition for writ of certiorari be extended to and including September 23, 1986.

The jurisdiction of this Court to review the *en banc* decision of the District of Columbia Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

5 U.S.C. § 552 of the Freedom of Information Act provides in relevant part:

(a) Each agency shall make available to the public information as follows:

* * *

(3) . . . each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

* * *

(4)(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principle place of business, or in which the agency records are situated, or in the District of Columbia, has

jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

* * *

(b) This section does not apply to matters that are

* * *

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

* * *

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

26 U.S.C. § 6103, *Confidentiality and disclosure of returns and return information,* provides in pertinent part:

(a) General rule—Returns and return information shall be confidential . . .

* * *

(b) Definitions—For purposes of this section

* * *

(2) Return information. The term "return information" means

(A) A taxpayer's identity, the nature, source, or amount of his income, payments,

receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and

(B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b) which is not open to public inspection under section 6110,

but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

STATEMENT OF THE CASE

In May of 1979, Petitioner, the Church of Scientology of California ("Church"),[1] directed a Freedom of Information Act ("FOIA") request to the Internal Revenue Service ("IRS", "Service" or "government"), for specific records relating to the Church, the religion of Scientology and the Founder of the religion. The IRS failed to respond in a timely fashion to the request or to the Church's subsequent administrative appeal, and suit was filed in the United States District Court for the District of Columbia in December of 1980. *Church of Scientology of California v. IRS,* 569 F. Supp. 1165, 1167 (D.D.C. 1983), (App. 2a).

In January of 1981, the IRS responded to the FOIA request and appeal. Excepting a small number of records

[1] The Petitioner was, at that time of the request, the Mother Church of the religion of Scientology.

released at that time, the IRS denied disclosure of the files sought, claiming that most of the materials located constituted "tax return information," the disclosure of which was regulated exclusively by 26 U.S.C. § 6103, and that, thus, the provisions of the FOIA were irrelevant. 569 F. Supp. at 1168, (App. 3a). It also claimed that, in any event, the documents were also exempted by FOIA sections 5 U.S.C. § 552(b)(3), (b)(5), (b)(6), and/or (b)(7)(A),(C) and (D). The IRS declined to provide further information justifying the withholdings under either 6103 or the FOIA exemptions claimed.

Faced with a paucity of information to evaluate the validity of the claimed exemptions, the Church filed a motion for an index of the withheld materials pursuant to *Vaughn v. Rosen,* 484 F.2d 820 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 977 (1974). This motion was denied by the district court, which ordered the IRS to submit the disputed documents to the court for *in camera* review. 569 F. Supp. at 1168 (App. 4a).

Subsequently, the IRS filed a motion for summary judgment in April of 1981, arguing *inter alia* that the documents submitted *in camera* constituted "tax return information" as broadly defined in 26 U.S.C. § 6103(b)(2), and were wholly outside the jurisdiction of the FOIA. Thus the government argued that the court's review of the IRS decision to withhold production of the documents was governed by the arbitrary and capricious standard of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), and not the *de novo* review standard of the FOIA, and that its actions relative to the request were neither arbitrary nor capricious. 569 F. Supp. at 1170, (App. 7a).[2]

After conducting an *in camera* review of some of the documents, the district court issued an opinion dated June 24, 1983, (App. 1a), denying the Church's motion for a *Vaughn* index and granting summary judgment to the IRS. The court held that the documents at issue constituted "tax return infor-

[2] Despite the search terms of the request, the IRS limited its search to files indexed *only* in the name of the requesting corporation, the Church of Scientology of California. Thus no third party tax returns or filings were presumably at issue in the case. Lacking a *Vaughn* index, the Church never learned precisely what type of records were genuinely at issue.

mation" as that term is defined in 26 U.S.C. § 6103(b)(2); that review of the agency's decision to withhold records was governed by the APA and not the FOIA; and that 6103 barred the release of the materials sought.

The district court, primarily relying upon the case of *Zale Corp. v. IRS,* 481 F. Supp 486 (D.D.C. 1979), and cases which have endorsed the *Zale* doctrine, including *King v. IRS,* 688 F.2d 488 (7th Cir. 1982), held that the particularized disclosure limitations of 6103 supersede the FOIA and provide the sole standards for the release of "tax return information." 569 F. Supp. at 1170, (App. 7a).

The Church noticed a timely appeal to the Court of Appeals for the District of Columbia Circuit on August 11, 1983, and the parties filed their briefs and argued the case before a panel of the Court in April 1984. By order dated August 7, 1985, the full court *sua sponte* determined to consider the following question *en banc:*

> Should the Court adhere to the interpretation of 26 U.S.C. § 6103(b)(2) adopted by the panel opinion in *Neufeld v. IRS,* 646 F.2d 661, 665 (D.C. Cir. 1981), or should it adopt a different interpretation, in particular that announced by the Seventh Circuit in *King v. IRS,* 688 F.2d 488, 490-94 (7th Cir. 1982)?

(App. 15a).

The Court's references to *Neufeld* and *King* concerned the conflicting interpretations of the so called "Haskell Amendment" to § 6103(b)(2), reflected in the leading decisions of the D.C. Circuit and Seventh Circuit. The "Haskell Amendment" was a last minute floor amendment proposed by Senator Haskell to an overall amendment to 6103 in July of 1976, and modified the detailed definition of "tax return information" in § 6103(b)(2) by stating:

> . . . but such term does not include data in a form which cannot be associated with or otherwise identify, directly or indirectly, a particular taxpayer.

Neufeld, at the time the controlling case in the D.C. Circuit,

had adopted the Ninth Circuit's holding in *Long* v. *IRS,* 596 F.2d 362, 365-66 (9th Cir. 1979), *cert. denied,* 446 U.S. 917 (1980). The Ninth Circuit held that return information, properly defined, included only information that directly or indirectly identified a particular taxpayer. 596 F.2d at 365-66.

The Seventh Circuit in *King* expressly rejected the reasoning in *Long* and *Neufeld,* 688 F.2d at 488, and instead held that disclosure of records following deletion of identifying information would somehow undercut the privacy concerns manifested in 6103, and that therefore the Haskell Amendment provided *only* for the disclosure of "amalgamated" statistical tabulations not associated with any particular taxpayer, 688 F.2d at 493-94. This "amalgamation" standard was enunciated in response to the court's quandary over the meaning of the language of the Haskell Amendment that permits the disclosure of "tax return information" if it is "in a form" that would not identify any taxpayer. The *King* court adopted in toto the IRS' interpretation of the Haskell Amendment, reasoning that more direct language would have been used by Congress had it intended to permit disclosure of all non-identifying information. 688 F.2d at 491.

In response to the August 7, 1985, Order of the Court of Appeals for the D.C. Circuit, sitting *en banc,* the parties herein filed supplemental briefs. The IRS argued that the *Neufeld/Long* "identity" test governing redaction and disclosure of non- identifying information from requested records should be rejected and that the Haskell Amendment *only* permitted the disclosure of statistical data taken from tax return information, which does not identify any taxpayer *and* which has lost its specificity by amalgamation into statistical data. (IRS Supplemental Brief for Appellees at 4, 6.) The government also argued that § 6103 was independent of and superseded the FOIA.

The Church argued [3] that § 6103 was simply another statutory limitation on the disclosure of governmental records and that its application to an FOIA request was governed by

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[3] Amicus briefs were filed by ACLU of Washington and by the FOIA Clearinghouse on behalf of Professor Neufeld supporting the Church's position.

FOIA exemption 3. Further, the Church argued that § 6103 materials were disclosable pursuant to the FOIA—by the administrative and judicial redaction of identifying information to create segregable portions of otherwise exempt documents pursuant to the mandate of FOIA, § 522(b). The Church argued that the plain language of the Haskell Amendment when read in conjunction with the overriding purpose of the FOIA favoring disclosure of governmental records, required an affirmance of *Neufeld* and *Long*, particularly where the segregation and disclosure of non-identifying information posed no risks to the privacy interests of any taxpayer.

The D.C. Circuit on May 27, 1986, issued four opinions in the case. These were: 1) a panel judgment, 2) a majority opinion by six judges of the Court sitting *en banc* (the opinion for which *certiorari* is sought herein), 3) a minority dissenting opinion by three judges of the Court sitting *en banc*, and 4) a concurring opinion by the tenth judge of the *en banc* court. Amendments to both the majority and dissenting opinions of the *en banc* court were filed on July 11, 1986.

The panel decision reversed the district court, holding *inter alia*, that § 6103 was a bona fide FOIA exemption 3 statute, 5 U.S.C. § 552(b)(3), and not independent of the dictates and procedures of the FOIA. 792 F.2d at 149-50, (App. 29a-30a). The Court of Appeals remanded the case, instructing the district court to direct the IRS to provide appropriate indices and affidavits justifying the documents withheld, yet reserved the issue of meaning of the Haskell amendment to the entire court *en banc*. 792 F.2d at 152-53, (App. 36a-37a).

The proper interpretation of the Haskell Amendment was the *sole* issue addressed *en banc*. The *en banc* majority, in an opinion by Judge Scalia, interpreted the Haskell Amendment by way of a complex evaluation of the language of § 6103 and surrounding statutes. In analyzing the Amendment the court focused on the phrase *in a form*, stating that it was the one phrase that had to be reconciled with the remaining language of the 25 page statute in order to give consistency to subsection (b). 792 F.2d at 157, 163, (App. 45a-56a). The decision

turned upon this phrase, and the majority adopted the following test for determining what records containing "return information" could be released in response to a FOIA request:

> We hold, more broadly than *King*, that as used in § 6103 (b)(2) the phrase "data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer" requires—in addition to the fact of non-identification—some alteration by the government of the form in which the return information was originally recorded. That reformulation will typically consist of statistical tabulation or of some other form of combination with other data so as to produce a unitary product that disguises the origin of its components . . .

792 F.2d at 163, (App. 56a).

The majority thus overturned the *Neufeld* "identity" test allowing release of tax return information in which identifying information was redacted, in favor of a "reformulation" standard, wherein non-identifying tax return information could be released only if it was not in its original form, and the origin of the information was thus "disguised." The term "reformulation" as used in this new test was not, however, defined.

A dissenting opinion by Judge Wald, joined by two other judges sitting *en banc*, challenged the reasoning of the majority, and held that "[t]he *Neufeld* approach . . . comports best with Congress' balancing of the strong interest in taxpayer privacy and the equally strong interest in disclosure under the Freedom of Information Act wherever taxpayer's privacy rights are not implicated." 792 F.2d at 172 (App. 17a). The dissent reasoned that there was nothing in the statutory text or structure of § 6103 to support the notion that wholly non-identifying information may not be disclosed unless it has been put in a different "form," 792 F.2d at 172, and that such an extreme requirement was at odds with the majority's own recognition that there is no reason why Congress would have wanted to forbid the disclosure of information which would not threaten the privacy of individual taxpayers.

The dissent concluded:

> The court today overreads an everyday casual phrase of no certain content to impose an important new and comprehensive restriction on disclosure of items listed in § 6103(b)(2), a requirement that does nothing in itself to advance the cause of taxpayer privacy. The majority adopts a "reformulation" test which Congress never intended, and which the majority itself is unable to define.

792 F.2d at 178, (App. 89a).[4]

Subsequently, amendments to the majority and dissenting opinions addressed the actual meaning of the "tax model," an IRS document used as an example by the IRS and the Court of Appeals to describe the type of document which could be released pursuant to the majority's test. As noted in both amendments, (App. 90a-92a), the majority initially misunderstood the significance of the tax model, although it declined to alter its opinion based on its newfound understanding. The dissent noted that this mistaken factual assumption demonstrated that the underlying premise of the "reformulation" interpretation was clearly in error, as the tax model itself, although acknowledged to be disclosable pursuant to § 6103, does not meet the "reformulation" requirement. (App. 92a).

REASONS FOR GRANTING THE WRIT

1— The En Banc Decision of the Court of Appeals Directly Conflicts With Decisions of the Ninth, Seventh and Eleventh Circuits

The *en banc* majority's interpretation of the Haskell Amendment erects yet a third standard respecting the application of 26 U.S.C. § 6103(b)(2) to FOIA requests for records from the IRS and creates further uncertainty respecting the predictable administration of FOIA requests made to the IRS. The decision is in direct conflict with decisions from the Ninth, Seventh and Eleventh Circuits, and such conflict deserves this Court's attention.

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[4] In an opinion concurring in the result, Judge Silberman agreed that *Neufeld* should be overturned, yet he also rejected the majority rule, reasoning that the interpretation of the Haskell Amendment should be reserved to the agency. 792 F.2d at 172, (App. 75a).

The majority's requirement of some sort of unspecified "reformulation" of information contained in records requested under FOIA as a predicate to disclosure, portends virtual chaos in the nationwide adjudication of FOIA disputes.

The *en banc* decision most directly conflicts with the Ninth Circuit's decision in *Long v. IRS*, 596 F.2d 362 (1979), *cert. denied* 446 U.S. 917 (1980). *Long* was followed in the D.C. Circuit in *Neufeld v. IRS*, 646 F.2d 661 (1981), until overturned in part by the *en banc* decision herein. Under *Long*, FOIA requests for IRS records that may contain tax return information are governed by the FOIA, applying § 6103 (b)(2) as an exemption 3 statute. Thus, requested records containing tax return information which is otherwise exempt are subject to disclosure under FOIA where reasonably segregable portions remain after identifying information is redacted by the IRS and where disclosure of the resulting records poses no reasonable threat to the privacy interest of any taxpayer. 596 F.2d at 366. *Long* thus follows the rule of this Court, as well as the mandate of FOIA 5 U.S.C. § 552(b), that the agency *and* the district court are responsible to examine withheld documents to determine what non-exempt *portions* thereof may be properly disclosed. *Department of Air Force v. Rose*, 425 U.S. 352, 374 (1976).

Contrary to the *Long/Neufeld* decisions is the Seventh Circuit's decision in *King v. IRS*, 688 F.2d 488, 495 (1982). The court in *King* held that tax return information is controlled exclusively by the Administrative Procedures Act through § 6103, without reference whatsoever to the FOIA. *King* further holds that the only type of tax return information disclosable pursuant to § 6103 and the Haskell Amendment is "amalgamated" statistical information which does not identify any taxpayer. 688 F.2d at 494. Thus, under *King*, the IRS has no responsibility or duty to delete identifying information to make otherwise exempt tax return information disclosable.

The Eleventh Circuit rule on this issue is a further hybrid. In *Currie v. IRS*, 704 F.2d 523, 526-28 (11th Cir. 1983), the court specifically held that § 6103 is an FOIA exemption 3

statute, yet also rejected the "identity" test as the proper interpretation of the Haskell Amendment. Instead, the court stated that the Haskell Amendment "was intended to allow release of statistical studies and compilation of data by the IRS to, *inter alia*, committees of Congress." 704 F.2d at 531.

The panel decision by the Court of Appeals herein, *Church of Scientology of California v. Internal Revenue Service*, 792 F.2d 146 (D.C. Cir. 1986), correctly holds that disclosure of tax return information is controlled by § 6103 as an FOIA exemption 3 statute. The *en banc* decision of the D.C. Circuit, 792 F.2d 153 (1986), for which *certiorari* is here sought, addressed *only* the interpretation of the Haskell Amendment, *given* that § 6103 is a FOIA exemption 3 statute.

The *en banc* decision differs markedly from *Long, King* and *Currie* in that it holds that only "reformulated" tax return information which does not otherwise identify a taxpayer may be disclosed to an FOIA requestor. The majority found "amalgamation" (under *King*) with other materials unnecessary, mere deletion of identifying information (under *Long*) insufficient to justify release, and no duty placed upon the IRS or district courts to redact exempt information to permit disclosure of reasonably segregable portions of the requested records. 792 F.2d at 160-63.

While putatively determining to settle *en banc* the sticky issue of the direct conflict between *Long, Neufeld* and *King*, the court has created a confusing morass that can only generate further confusion in the effective administration of the FOIA by the IRS and district courts.

This Court should resolve the dilemma created by these conflicting decisions. A uniform, judicially imposed standard that accommodates both the purposes of the FOIA (disclosure of governmental activities) and the purpose of § 6103 (maintenance of the privacy of tax returns) should be established. The result below accomplishes neither. IRS records concerning their myriad plans, programs and actions relating to the assessment and collection of taxes are, practically speaking, immune from disclosure, and purported "tax return information" even though

not conceivably identifying any taxpayer must yet be "reformulated" under the *en banc* majority's view before it can be subject to disclosure.

Thus, the IRS, merely by claiming that a requested document has not been "reformulated," may exempt that document from disclosure under the decision at issue herein, whether it impinges on the privacy of any taxpayer or not. Such a result is clearly contrary to this Court's interpretation of the overall purpose of the FOIA.

As pointed out in the dissenting *en banc* opinion, the new "reformulation" requirement has no recognizable standard, and turns not upon the information contained in the document, but whether or not the IRS chose to place the words somehow in a different "form" than they originally appeared in the IRS files:

> Indeed, even the majority is unable to set forth a general test for when information is in a different form. Maj. Op. at 160-163. All it is sure of is that deletion is not sufficient and aggregation is not necessary. . . The glaring deficiency with the majority's "reformulation" test is that it never specifies from *what* original form the reformulatiom must be done and just what satisfies the reformulation requirement. The majority refers to "some alteration by the government of the form in which the return information was originally recorded." *Id.* at 163 Yet the IRS obviously has information in its files in hundreds of different developmental stages. For example, notes of an investigation, abstracts of an investigation, list of investigations done in a week, etc. . . To say that there must be "reformulation" does not at all answer the question of what is an original form to begin with.

792 F.2d at 175, n.6, (App. 83a), (emphasis in original).

A test can scarcely be imagined which would create more conflict between the IRS and citizen requestors and require difficult hair splitting by the courts on a case by case basis.

No other court of appeals beyond the Seventh and Eleventh Circuits that has reviewed the application of § 6103 to the FOIA, has required either a "reformulation" or "amalgamation" of information, or anything remotely resembling it. Every other circuit addressing the issue has held that § 6103 is an FOIA exemption 3 statute, but has not directly confronted the standard for release pursuant to the Haskell Amendment, in light of and subject to the holding in *Department of the Air Force v. Rose* requiring release of segregable material after deletion of portions which are exempt. *See, Breuhaus v. IRS,* 609 F.2d 80 (2d Cir. 1979); *Grasso v. I.R.S.,* 785 F.2d 70 (3rd Cir. 1986); *Mason v. Calloway,* 554 F.2d 129, 131 (4th Cir. 1977), *cert. denied,* 434 U.S. 877 (1977); *Linstead v. IRS,* 729 F.2d 998, 1001-03 (5th Cir. 1984); *Osborn v. IRS,* 754 F.2d 195, 196 (6th Cir. 1985).

Conflicting decisions in the circuits oblige FOIA requestors who have alternative jurisdictions available, to pick and choose the circuit within which to make requests for certain kinds of information, and which circuits to clearly avoid. For example, an FOIA requestor living in the Seventh Circuit or Washington, D.C., and without alternative bases for jurisdiction elsewhere, is out of luck if he seeks "tax return information" which is not somehow "amalgamated" or "reformulated" even if his request would not conceivably identify any taxpayer after deletion of identifying information. A scholarly researcher from the University of Chicago or commentator living and working in Capitol Hill would be well advised to have a colleague living in San Francisco pursue his research utilizing the FOIA.

This situation is exacerbated by the *en banc* decision at issue, as the FOIA specifically provides a variety of jurisdictions in which *any* requestor may bring a lawsuit seeking disclosure of withheld records. 5 U.S.C. § 552 (a)(4)(B). As is clearly evidenced by the large number of decisions construing the FOIA from the D.C. Circuit, no court absent the Supreme Court has a greater impact upon the national administration of the FOIA.

The *en banc* majority seeks to resolve the meaning of an ambiguous phrase in the statute—"in a form"—with an even more ambiguous term—"reformulation"—a term which, as pointed out by the dissent, has no meaning in practical application in the creation of IRS records. *Every* record actually created by the IRS is a "reformulation" of data collected by the Service. The majority made no attempt to define its terminology, which is certain therefore to create further confusion for the litigants and the district courts. As demonstrated in the following section, the *en banc* decision has far-reaching practical significance.[5]

II— The Decision of the Court of Appeals Raises Important Issues of National Significance Affecting Many Thousands of Citizens

Section 6103 was passed by Congress for the express purpose of halting abuses of the IRS and Executive Departments in their unbridled disseminations of tax returns and tax return information provided to the IRS by citizens. As stated in *McSurely v. McAdams,* 502 F. Supp. 52, 56 (D.D.C. 1980):

> The legislative history underlying the Tax Return Act of 1976 indicates that the overriding purpose of section 6103 was to protect tax returns and return information from misuse by the White House, various Executive Branch agencies and other government entities. S. Rep. No. 94-938, 94th Cong., 2d Sess. 316-18 (1976) . . .; 122 Cong. Rec. 24012-13 (1976) (Remarks of Senators Dole and Weicker) ("Remarks"). Of particular concern was the misuse of tax information for partisan political purposes. Senate Report at 316-17; Remarks at 24012-13. . . . As mentioned earlier, the main concern of Congress was the

[5] As noted by the dissenting opinion below, the disclosability of actual tax returns and information filed by taxpayers is not at issue here. 792 F.2d at 172, (App. 77a). Such items are covered by § 6103(b)(1), are not subject to the Haskell Amendment, and are thus genuinely immune from disclosure under FOIA exemption (b)(3).

> status of the IRS as a virtual "lending library of confidential tax information" to various governmental agencies. Remarks at 24013 (Sen. Weicker) . . .

In scores of FOIA cases, the IRS has, through dogged and repetitious advocacy of its interpretation of the language of § 6103, and to "protect the privacy interests of taxpayers," altered the purpose of § 6103 from a protection of the citizenry to a protection of the *IRS* from exposure of its activities.

The position of the IRS accepted in toto by the Seventh Circuit in *King*, requiring "amalgamation" of statistical information precedent to release of information, and the standard now articulated by the D.C. Circuit, requiring "reformulation" of tax return information, gives the IRS in these circuits a virtual immunity from the release of documents it chooses to shield from public scrutiny.

It is no exaggeration to say that the IRS considers nearly all of the information it collects to fall within the definition of "tax return information." During *en banc* oral argument, counsel for the government admittedly had difficulty conceiving of records which would not be covered within the Service's present definition of "tax return information." (App. 22a-23a). The definition of "tax return information" in § 6103(b)(2) is indeed extremely broad, obviously consistent with Congress' intent to ensure that the IRS did not abuse the disclosure of information citizens are required to provide the agency.

It would be a rare FOIA request for records of the IRS which did not fall within the rubric of this definition. The § 6103(b)(2) definition would clearly include records concerning the sort of governmental acts § 6103 was designed in part to prevent: unlawful and discriminatory investigations or audits of citizens or organizations, blacklisting of persons or organizations for special administrative treatment, abuse of IRS collection or assessment powers for political purposes, abuses of subpoena powers, and so forth. There is simply no indication that Congress intended to give the IRS the ability to shield its

activities from public scrutiny in the context of a statute designed to protect the taxpayer from myriad IRS abuses. It is for this reason that *Long, Neufeld* and the *en banc* dissent would allow for the disclosure of materials which *do not identify* any taxpayer.

However, despite the actual purposes of § 6103, figures released by the Service as ordered by Congress [6] indicate that disclosures made to government agencies, the *real* target of § 6103, have been massive indeed. During 1984, the IRS made 7,441 disclosures to the Department of Justice and other federal agencies, 157 *million* disclosures to federal agencies for "statistical" purposes and 89 *million* disclosures to state tax agencies. In addition to these disclosures, the IRS on 1.2 *million* occasions provided information to federal, state and local agencies for the purpose of alleged child-support enforcement.

Despite these millions of disclosures of apparent tax return information to federal and state government agencies, the IRS seeks to prevent citizens and private organizations from gaining access to virtually any records. Yet, the IRS, perhaps because it has such a major impact on the lives of every man, woman and child in the nation, is subject to thousands of information requests by citizens. In 1984 the IRS *responded* to 17,962 written requests and serviced additional requests to 13,750 persons in its public reading rooms.[7] How many of these requests resulted in disclosures and how many requests were not responded to at all is not reported. However, many requests have resulted in litigation disputes with an agency unwilling to abide by the mandate of FOIA and decisions of this Court. During calendar year 1984, 2,026 disclosure cases were filed, and as of September 30, 1985, 919 cases were pending.[8]

In the government's brief below, it openly stated the result it desired:

> [A]lthough the Church invoked the FOIA right in its complaint, there is simply no right to inspect

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[6] *Commissioner's/Chief Counsel's Annual Report*, 1985. This is the most current statistical report by the IRS available to the public.

[7] Id.

[8] Id.

> Section 6103 records under the Act, and its policies and procedures are irrelevant in assessing a request for access to Section 6103 records. Such a conclusion has many important ramifications. There is no requirement to segregate and release those parts of records to which the FOIA might otherwise be said to apply; there is no burden placed upon the government to justify non-disclosure; and there is no *de novo* review of the Government's decision not to release records the disclosure of which is committed to its discretion.

Brief for Appellee at 12-13.

In this light, the *en banc* decision has important ramifications. Although the IRS may be formally required to comply with the procedures or mandate of the FOIA, it might as well be exempted from the Act altogether as it will be able to withhold any record it chooses simply by alleging that the records sought have not been "reformulated" for release. Whether or not taxpayer privacy interests are genuinely implicated will become nugatory, and litigation on the matter will clog the courts.

III— The Decision of the Court of Appeals Conflicts With the Rulings of this Court and the Intention of Congress Regarding Availability of Governmental Records

The majority decision below severely undermines Congress' intent in enacting both § 6103 and the FOIA.

This Court has established the appropriate lens through which equivocal interpretations of aspects of the FOIA must be viewed, based upon the overriding Congressional mandate that "disclosure, not secrecy, is the dominant objective of the Act." *Department of the Air Force v. Rose,* 425 U.S. 352, 361 (1976).

Thus, this Court has emphasized on numerous occasions that the clearly expressed intention of Congress in declaring the goals for the Act serves as the paramount guide to future interpretations of the Act by the courts.

> Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands. Subsection (b) is part of this scheme and represents the congressional determination of the types of information that the Executive Branch must have the option to keep confidential, if it so chooses. As the Senate Committee explained, it was not "an easy task to balance the opposing interests, but it is not an impossible one either. . . Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure." S. Rep. No. 813, p. 3.

Department of Air Force v. Rose, 425 U.S. at 361-62, quoting in part *EPA v. Mink*, 410 U.S. 73, 80 (1973).

These goals were ignored by the majority below, and were ignored in the equally incorrect yet conflicting *King* decision. Rather than establishing a standard for disclosure which would forward the interests of the FOIA while also protecting the privacy interests of citizens, the court of appeals below chose to establish an unworkable test which, for all practicable purposes, will afford the IRS an immunity from the FOIA that no other agency enjoys.

Decisions of the circuits regarding the meaning of the Haskell Amendment are becoming not *more uniform,* but *more diverse* as evidenced by the majority's *en banc* opinion below. The confusion and inconsistencies resulting from the conflicting interpretations of § 6103(b)(2) rendered by the *en banc* court below and other courts of appeals manifest a need for a national standard and explicit guidance by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the *en banc* opinion of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

/s/ ROBERT A. SEEFRIED
ROBERT A. SEEFRIED, P.C.
Suite 600
1718 Connecticut Ave., N.W.
Washington, D.C. 20009
(202) 745-7757

Counsel for Petitioner

Dated: September 23, 1986

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-3239

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
Plaintiff,

v.

INTERNAL REVENUE SERVICE,
Defendant.

MEMORANDUM OPINION

Plaintiff Church of Scientology of California (hereinafter California Church) brings this action under the Freedom of Information Act (FOIA) [1] to compel the Internal Revenue Service (IRS) to release certain documents claimed by that agency to be exempt from disclosure under FOIA. This matter is now before the Court on defendant's motion for summary judgment.[2] For the reasons set forth herein, the Court finds that no material issues of fact remain in dispute, and that defendant is entitled to summary judgment as a matter of law. Accordingly, defendant's motion for summary judgment will be granted.

DISCUSSION

I. Plaintiff's FOIA Request

In its original request under FOIA submitted on May 16, 1980, plaintiff sought the release of virtually *all* materials

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[1] 5 U.S.C. § 552 *et seq.* (1976 & Supp V 1981).

[2] Arthur L. Lappen, Chief Branch 3 Disclosure Litigation Division, IRS, has been dropped as a named defendant in this action at the plaintiff's request.

contained in IRS files nationwide which pertained specifically to the California Church, and to Scientology, in general.[3] Included within the scope of plaintiff's request were documents sought by plaintiff in its First Request of Production of Documents in an ongoing action before the United States Tax Court entitled *Church of Scientology of California v. Commissioner of IRS*, Docket No. 3352-78 (U.S.T.C.) (hereinafter referred to as Tax Court case). Plaintiff's FOIA request thereby included all materials received or generated by IRS in connection with the Tax Court case, as well as materials indexed, but adjudged exempt from disclosure, in a previous FOIA action entitled *Church of Scientology of California v. IRS*, Civil No. CV 74-3465-RJK (C.D. Cal. October 29, 1976), *appeal dismissed*, No. 77-1365 (9th Cir. 1978) (hereinafter referred to as a FOIA I).

In its May 16, 1980, request, plaintiff acknowledged that the volumes of materials involved would make it impossible for the IRS to respond within the statutory ten-day period, but asked that the California Church be apprised of an anticipated schedule for response. IRS wrote to plaintiff on July 22, 1980, to ask plaintiff to agree to a voluntary extension of defendant's time for response until August 29, 1980. Plaintiff filed an appeal with IRS on September 17, 1980, after no further response from IRS had been forthcoming. Plaintiff did not await defendant's response to the appeal, but instead commenced the instant action.

[3] Plaintiff's May 16, 1980, FOIA request sought

> Copies of all information relating to or containing the names of Scientology, Church of Scientology, any specific Scientology Church or entity identified by containing the words Scientology, Hubbard, and/or Dianetics in their names, L. Ron Hubbard or Mary Sue Hubbard in the form of a written record, correspondence, document, memorandum, form, computer tapes, computer program or microfilm; which is contained in any of the following systems of records, including but not limited to those located at the National office, Regional offices, Service Centers, District offices, or local IRS offices [four page list identifying IRS record systems by appropriate code numbers is omitted].

Plaintiff also sought IRS personnel training materials located in Covington, Kentucky, and requested the release of "copies of file labels or tabs identifying any and all files containing information requested herein." Letter of Rev. James Morrow to Chief, Disclosure Staff, IRS, dated May 16, 1980.

Defendant's determination of plaintiff's FOIA appeal was issued on January 14, 1981. The scope of plaintiff's FOIA request was found to be properly limited to materials pertaining to the California Church, and the proper extent of the agency's search was found to be limited to the IRS National office.[4] Further, defendant construed plaintiff's FOIA request as encompassing materials falling into four categories: (1) those documents withheld from disclosure and adjudged exempt in FOIA I; (2) those documents indexed in connection with the Tax Court Case and relating to that case; (3) those documents generated subsequent to the Tax Court case; and (4) any documents relating to the California Church which were generated subsequent to the Tax Court case index and are located in the IRS National office. Letter of Gerald G. Portney, Assistant Commissioner (Technical), IRS to Rev. James Morrow, dated January 14, 1981, p. 3. Defendant denied plaintiff's appeal in substantial part after determining that (1) principles of *res judicata* and collateral estoppel barred plaintiff from relitigating its claim to access to FOIA I documents; and (2) the remaining documents at issue were exempt from disclosure under 26 U.S.C. § 6103 *et seq.* (1976 & Supp. V 1981) and 5 U.S.C. § 552(b)(6) (1976 & Supp. V 1981).

On June 18, 1982, the Court denied plaintiff's motion for a detailed justification, itemization and indexing by the defendant of the withheld materials as approved by the Court in *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S.

[4] Although defendant limited its search to its National office, defendant did search and locate documents lodged in Covington, Kentucky, and in the offices of the District Counsel for Los Angeles. The other sites searched by defendant included the following: Offices of the Commissioner; Deputy Commissioner; Assistant Commissioner (Compliance); Assistant Commissioner (Technical); Assistant Commissioner (Employee Plans/Exempt Organizations); Assistant Commissioner (Inspection); Audit Division; Criminal Investigation Division; Office of International Operations; Covington, Kentucky office; Returns Processing and Accounting Division; Collection Division; Appeals Division; Chief Counsel; Deputy Chief Counsel (Administrative); Deputy Chief Counsel (Technical); Deputy Chief Counsel (Litigation); Administrative Services; Criminal Tax Division; Disclosure Litigation Division; Employee Plans and Exempt Organization Division; General Litigation Division; Interpretive Division; Legislation and Regulations Division; and Tax Litigation Division.

977 (1974), and granted defendant's motion to submit for *in camera* inspection certain documents located at the IRS National office. The Court also ordered, *sua sponte,* that *all* documents responsive to plaintiff's request and related to the Tax Court case be submitted for *in camera* review. Submission of the documents within the scope of the Court's June 18, 1982, Order has been accomplished, and defendant now urges the Court to find that the documents remaining at issue are properly exempt from disclosure.[5]

II. Defendant's Motion For Summary Judgment

A. FOIA I Documents

In moving for summary judgment, defendant first contends that plaintiff is barred by the operation of the doctrine of *res judicata* from relitigating its claim to access of the documents at issue in FOIA I. In opposition, plaintiff asserts that defendant must demonstrate that the *res judicata* effect of the final judgment in FOIA I has not been suspended by subsequent material changes in law or fact. Plaintiff has, however, cited no authority which supports its contention that the burden falls upon the *defendant* to prove that the absence of any material changes in circumstances leaves undisturbed the bar to relitigation erected by the prior judgment.

In *Commissioner of Internal Revenue v. Sunnen,* 333 U.S. 591 (1948), the Court considered the applicability of *res judicata* and collateral estoppel doctrines to determinations of income tax liability in different tax years. The Court held that in the interest of justice, the operation of collateral estoppel "must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged." *Id.,* at 600 (citations omitted). The instant case presents the very situation defined in *Sunnen* as one in which the operation of collateral estoppel is appropriately confined. There is no question that the documents at issue in both FOIA I and the instant case are identical, as are the

[5] Plaintiff no longer seeks disclosure of the documents indexed by defendant in the Tax Court case.

parties. Further, defendant does not seek to assert claims of exemption different from those asserted in FOIA I, *see Wolfe v. Froehlke,* 358 F. Supp. 1318, 1319-20 (D.D.C. 1973). *affirmed,* 510 F.2d 654 (D.C. Cir. 1974) (*res judicata* not a bar to relitigation of plaintiff's claim to access to document under FOIA when agency asserts new basis for exemption from disclosure). Plaintiff in the instant case correctly cites *Sunnen* for the proposition that the binding effect of a prior final judgment might be altered or even nullified by a "subsequent modification of the significant facts or a change or development in the controlling legal principles . . ." *Id.,* at 599. Plaintiff, however, has not even alleged that any such modification in law or fact has occurred with regard to this action. Nothing in the legislative history of FOIA or the language of the Act suggests that a defendant in an action brought under FOIA who alleges *res judicata* as an affirmative defense bears a special burden of proving that documents already adjudged exempt *remain* exempt. *See Church of Scientology of California v. U.S. Dep't of the Army, et.al.,* 611 F.2d 738, 750 fn. 7 (D.C. Cir. 1979). Where the issues, documents, and plaintiffs are identical in both the prior and present FOIA litigation, "[t]he issue of exemption cannot be relitigated." *Id.* at 751. The Court notes that defendant, in responding to plaintiff's FOIA request in the action *sub judice,* reviewed the 290 documents found to be exempt from disclosure in FOIA and identified twenty of that total number which had been withheld in full or in part on the basis of 5 U.S.C. § 552(b)(7)(A).[6] Affidavit of Charles W. Rumph, Technical Advisor, Tax Litigation Director, IRS, ¶ 2. These twenty documents were then reviewed, and defendant concluded that Exemption (b)(7)(A) no longer provided a basis for non-disclosure. *Id.,* ¶ 3. All documents previously withheld solely on the basis of Exemption (b)(7)(A) were, therefore, released by the defendant. *Id.* Plaintiff's contention that defendant's failure to justify anew the bases for non-disclosure of the documents at issue in FOIA I must, therefore,

[6] Exemption (b)(7)(A) exempts from disclosure under FOIA those documents which constitute "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings . . ." 5 U.S.C. § 552(b)(7)(A) (1976 Supp. V 1981)

be rejected as without merit, and the Court must find that plaintiff is estopped from relitigating its claim to access to the FOIA 1 documents.

B. Documents Pertaining to Ongoing Tax Court Litigation

Although plaintiff has dropped its claim to documents indexed by the defendant in the ongoing litigation in the U.S. Tax Court, a substantial number of documents relating to that action but generated or received by defendant subsequent to its preparation of the index in the Tax Court case remain in dispute. Defendant contends that the documents constitute confidential tax return information within the meaning of 26 U.S.C. § 6103 *et seq.* (1976 & Supp. V 1981) and, as such, are exempt from disclosure.

The first question presented with respect to these "post-index" documents is whether they can, indeed, be properly characterized as confidential tax return information within the definition of 26 U.S.C. § 6103(b)(2)(A).[7] The Court's *in camera* examination of a representative number of the documents in question reveals that the documents each identify a

[7] "Return information" is defined as encompassing

> a taxpayer's identity, the nature, source or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, over-assessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data received by, recorded by, prepared by, furnished to, or collected by Secretary with respect to a return or with the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense . . .

26 U.S.C. § 103(b)(2)(A) (1976 & Supp. V 1981). Criminal penalties attach to the unauthorized disclosure of data as set forth in § 6103. 26 U.S.C. § 7213. In addition to the specified instances where disclosure is authorized, disclosure of data under § 6103 may be made "in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer." § 6103(b)(2).

specific taxpayer, and contain "private facts taken directly from tax returns or IRS comment upon the private tax situations of specific taxpayers." *King v. IRS,* 688 F.2d 488, 494 (7th Cir. 1982). *See also Neufield v. IRS,* 646 F.2d 661 (D.C. Cir. 1981). The Court concludes, therefore, that these "post-index" documents clearly constitute return information within the statutory definition.

Having concluded that the contested materials are return information, it must be determined to what extent, if any, the provisions of section 6103 affect plaintiff's claim to access to those materials under FOIA. Defendant relies on *Zale v. IRS,* 481 F.2d Supp. 486 (D.D.C. 1979) to support its contention that the "particularized disclosure scheme" of section 6103 effectively pre-empts the more general disclosure criteria of FOIA. *Id.* at 489. Defendant thus contends that in accordance with *Zale,* the Court's review of defendant's decision to withhold the return information sought by plaintiff will not be subject to the *de novo* review available under FOIA, but will properly be limited to the determination of whether "the decision to withhold was . . . an arbitrary or unconscionable abuse of discretion." *Id.* at 490.

This Court has had the opportunity to consider the applicability of FOIA to disclosure requests for confidential return information in a prior action entitled *Service Employees International Union v. IRS,* No. 82-1081 (decided January 1, 1981). Consistent with the decision in that action, the Court today again adopts the rationale of *Zale* in holding that section 6103 "must be viewed as the sole standard governing release of tax return information." *Zale v. IRS,* 481 F. Supp. at 490. *Accord King v. IRS,* 688 F.2d 488 (7th Cir. 982); *Anheuser-Busch, Inc. v. IRS,* 493 F. Supp. 549 (D.D.C. 1980); *but see, e.g. Britt v. IRS,* No. 77-1325 (D.D.C. decided September 9, 1982).

The Court must, therefore, determine whether defendant's decision to withhold the "post-index" documents can be upheld as rational and supported in the record. Section 6103 provides but a few limited exceptions to the general prescription of confidentiality of return information. Disclosure of return information may be made to persons deemed to have a

"material interest" in such information as defined under section 6103(e)(1),[8] barring a determination by the IRS that disclosure "would seriously impair Federal tax administration." 26 U.S.C. § 6103(c) and (e)(6) (1976 & Supp. V 1981). *In the instant action, defendant concedes that plaintiff has a material interest in the documents in question, but has determined that disclosure would seriously interfere with defendant's duties in connection with the ongoing Tax Court litigation by revealing its litigation strategy and attorney work products.* In view of the ongoing nature of the Tax Court litigation, and after *in camera* inspection of *a representative number of the* documents, the Court finds that those documents do relate to defendant's litigation strategy, and reflect the work product of attorneys employed by the defendant. Since revelation of the documents would thus affect the defendant's ability to defend its position in the Tax Court case, the Court finds that defendant has demonstrated that its withholding of the documents was rational, and not beyond the bounds of its discretionary authority under section 6103.[9]

C. Disclosure of Documents From IRS National Office

Defendant has located and indexed twenty-one documents in its National office which are responsive to plaintiff's FOIA request. These documents were generated or received by defendant subsequent to its preparation of the index submitted in the Tax Court case, but do *not* relate to the ongoing Tax Court litigation. Ten of the twenty-one documents have been released in full; portions of the remaining eleven documents have been withheld by the defendant.

[8] 26 U.S.C. § 6103(e)(1) (1976 & Supp. V 1981). Individual taxpayers are deemed to have a "material interest" in disclosure of their own return information under section 6103(e)(1).

[9] Even assuming, *arguendo* that section 6103 must be viewed as a qualifying exempting statute under 5 U.S.C. § 552(b)(3), *see e.g. Chamberlain v. Kurtz*, 589 F.2d 827 (5th Cir. 1979), *cert. denied*, 444 U.S. 842 (1979), and that judicial review would thus be in accord with the provisions of FOIA, the Court is persuaded after its *in camera* inspection of the pertinent documents that defendant's non-disclosure is not improper under the criteria of either section 6103 *or* FOIA Exemption 3.

Defendant contends that the deleted portions of eight of the eleven documents at issue are exempt from disclosure under 5 U.S.C. § 552(b)(6) ("Exemption 6"), which exempts from disclosure under FOIA matters that are "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (1976 & Supp. V 1981).

In determining whether a claim of exemption for a "clearly unwarranted invasion of privacy" under FOIA Exemption 6 may properly be asserted, a court must balance "(1) the plaintiff's interest in disclosure; (2) the public interest in disclosure; (3) the degree of the invasion of personal privacy; and (4) the availability of any alternative means of obtaining the requested information." *Church of Scientology of California v. Dept. of the Army, et al.*, 611 F.2d 738, 746 (9th Cir. 1979). *See Department of The Air Force v. Rose*, 425 U.S. 352 (1976); *Rural Housing Alliance v. U.S. Dep't of Agriculture*, 498 F.2d 73 (D.C. Cir. 1974). The Court has examined *in camera those* portions of each of the eight documents claimed by defendant to be exempt under Exemption 6 and has concluded that the balance of factors clearly weighs in favor of non-disclosure by the defendant.

Document A-1 is comprised of "log cards" maintained by defendant. Document A-6 is a ten-page document dealing largely with a draft legal opinion concerning plaintiff's tax-exempt status. Document A-10 consists primarily of a letter to Senator Inouye from the Acting Director of defendant's Tax Litigation Division. Document A-12 is a two-page memorandum concerning a prior summons enforcement suit against the plaintiff. Documents A-13 and A-15 are "buckslips" concerning litigation against the plaintiff. Document A-15 is a single-page handwritten memorandum relating to defendant's response to plaintiff's motion for summary judgment. Document A-18 is a transmittal memorandum dealing with the filing of defendant's answer in the Tax Court case.

In each of the documents described above, the excised portions consist of the names of attorneys and other personnel employed by the defendant. The Court agrees with the defendant that the interest of plaintiff and the public in

knowing which attorneys and other personnel have been assigned to certain cases is *de minimus* when weighed against the interest of the individuals involved in maintaining anonymity as a means of avoiding potential harassment and find, therefore, that the excised portions are exempt from disclosure under Exemption 6.

Portions of Documents A-9 and A-21 have also been withheld by defendant on the basis that the excised data constitute confidential third-party return information whose release to plaintiff is unauthorized under 26 U.S.C. § 6103 (a) (1976 & Supp. V 1981). A single deletion in Document A-6 is also claimed by defendant to be proper on this basis. Document A-20 has also been partially withheld as being outside the scope of plaintiff's request. Defendant's claims of exemption with respect to these four documents thus raise the threshold question of whether defendant has properly construed the scope of plaintiff's FOIA request to exclude all materials not pertaining to the California Church.

As discussed, *infra*, the Court finds that defendant's non-disclosure of data constituting return information within the definition of 26 U.S.C. § 6103(b)(2)(A) is subject to judicial review in accordance with the criteria set forth under section 6103. Under section 6103, return information may be disclosed to third-parties at the discretion of the agency *if* such parties can demonstrate that they are acting in the capacity of designee of the individual taxpayer.[10] It is undisputed that in its May 16, 1980, FOIA request, plaintiff's representative provided defendant with the authorization of only the California Church.

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[10] Section 6103(c) provides:

> The Secretary may, subject to such requirements and conditions as he may prescribe by regulations, disclose the return of any taxpayer, or return information with respect to such taxpayer, to such person or persons as the taxpayer may designate in a written request for or consent to such disclosure, or to any other person at the taxpayer's request to the extent necessary to comply with a request for information or assistance made by the taxpayer to such other person. However, return information shall not be disclosed to such person or persons if the Secretary determines that such disclosure would seriously impair Federal tax administration.

See also 26 U.S.C. § 6103(e)(6) (1976 & Supp. V 1981); 26 C.F.R. § 601.702(c)(4)(ii)(c) (1982).

Defendant asserts that release to plaintiff of any return information pertaining to the individuals and Scientology entities other than the California Church as listed in plaintiff's request is unauthorized and, therefore, proscribed under section 6103.

An actionable request under FOIA for records in the possession of the IRS is defined under 26 C.F.R. § 601.702(c)(1) (1982) as one "which conforms in every respect with the rules and procedures set forth in this subpart." A FOIA request which includes within its scope materials properly classified as "return information" under section 6103 must "establish the identity and the right of the person making the request to the disclosure of the records . . ." 26 C.F.R. § 601.702(c)(v) (1982). Plaintiff concedes that in accordance with these pertinent statutory and regulatory requirements, defendant is obligated to protect against the *unauthorized* disclosure of third-party return information, but contends that the California Church is so "clearly related" to the third parties at issue as to make additional authorization superfluous. Plaintiff also asserts that defendant was required by its own regulations to request the additional authorizations from plaintiff *at the time* it first determined such proofs were necessary, and *before* defendant responded to plaintiff's FOIA request.

The regulatory language quoted by the plaintiff in support of this latter contention provides in relevant part:

> Additional proof of a person's identity shall be required before the request will be deemed to have met the requirement of paragraph (c)(3)(v) of this section if it is determined that additional proof is necessary to protect against unauthorized disclosure of information in a particular case.

26 C.F.R. § 601.702(c)(4)(ii)(C) (1982). The Court finds that the plain language of the cited regulation is devoid of any requirement that defendant notify a requester such as plaintiff of the need for additional proof *prior* to responding to a FOIA request encompassing third-party data. We conclude, therefore, that defendant properly construed the relevant statutory and regulatory requirements in determining that the scope of plaintiff's FOIA request was limited to data pertaining to the

California Church. In view of defendant's conceded obligation to protect against the unauthorized disclosure of third-party return information, the Court finds that the plaintiff's contention that additional proof would be superfluous is without merit.[11] Having determined that the scope of plaintiff's request was properly construed by defendant as limited to documents relating to the California Church, the Court turns to the portions of the four documents withheld from disclosure as outside the proper scope of plaintiff's request. After an *in camera* examination of these four documents in their entirety, it is clear that the excised portions all relate to individuals and entities other than the California Church. The Court thus finds that the excised portions were properly withheld.

The sole remaining question concerning defendant's response to plaintiff's request is whether defendant has demonstrated, as a matter of law, that its search for responsive documents was adequate. Plaintiff contends that the Court cannot find defendant's search to be adequate in view of defendant's arbitrary and capricious refusal to search *all* IRS field offices. It is established in this Circuit that a request for information under FOIA does not impose a burden upon an agency to reorganize its files, "but does [impose] a firm statutory duty to make *reasonable* efforts to satisfy "a FOIA request. *Founding Church of Scientology v. NSA*, 610 F.2d 824, 837 (D.C. Cir. 1979). (Emphasis added). The Court must, therefore, test the adequacy of defendant's search in the instant case against a standard of reasonableness. *See McGehee v. CIA*, 697 F.2d 1095 (D.C. Cir. 1983). It is undisputed that plaintiff directed its May 16, 1980, FOIA request to defendant's National office. In its FOIA request, plaintiff stated that "this request is being directed to the National office so proper coordination and handling can occur." Letter of Rev. Morrow to Chief, Disclosure Staff, IRS, p. 7. No similar request was made by plaintiff to each IRS field offices, as required under 26 C.F.R. § 601.702(c)(iii) (1982).

[11] That plaintiff's contention is without merit is particularly apparent when the absence of any indication by plaintiff of any legal relationship between plaintiff and the third-parties at issue is considered.

From the variety of offices searched by the defendant, it is evident that there is no *single* office or recordkeeping system which is the repository of *all* data relating to the California Church.[12] Defendant has produced for *in camera* inspection a voluminous amount of materials responsive to plaintiff's request. The record in this action reflects that these documents were located through a search of *all* the offices specifically identified by plaintiff in its request, including the Covington, Kentucky, office where IRS personnel have received instruction in audit procedures affecting plaintiff. In addition, defendant searched the District Counsel offices in Los Angeles, the IRS district in which plaintiff is located. Plaintiff's assertions that the extent of defendant's search was inadequate would thus appear to bear only upon its claims, rejected today, for materials relating to individuals and entities other than the California Church. In view of all of the foregoing considerations, the Court finds that plaintiff has failed to raise a genuine dispute on the issue of the adequacy of defendant's search. The Court concludes, therefore, that defendant's efforts to locate materials responsive to plaintiff's request were reasonable and, therefore, adequate as a matter of law.

The final issue before the Court is plaintiff's claim for the award of attorney fees. It is well-established that, at a minimum, an award of reasonable attorney fees to a plaintiff in a FOIA action must be based upon the finding that such plaintiff has "substantially prevailed." *See, e.g., Chamberlain v. Kurtz*, 589 F.2d 827 (5th Cir. 1979), *cert. denied* 444 U.S. 842 (1979). It is clear that since plaintiff in this action cannot be found to have met this threshold requirement, plaintiff is not entitled the award of attorney fees.

[12] The Court also notes that the documents sought by the plaintiff are not summaries or other compilations effected by defendant which might conceivably be lodged at a central site.

An Order consistent with this Memorandum Opinion will be entered on this date.

NORMA HOLLOWAY JOHNSON
United States District Judge

DATED: June 24, 1983

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1856

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
Appellant

v.

INTERNAL REVENUE SERVICE, *et al.*

BEFORE: Wright, Scalia and Friedman*, Circuit Judges

ORDER

The full Court has determined, *sua sponte*, to consider *en banc* the following question relevant to the above-captioned case:

> Should the Court adhere to the interpretation of 26 U.S.C. § 1603(b)(2) adopted by the panel opinion in *Neufeld* v. IRS, 646 F.2d 661, 665 (D.C. 1981), or should it adopt a different interpretation, in particular that announced by the Seventh Circuit in *King* v. *IRS*, 688 F.2d 488, 490-94 (7th Cir. 1982)?

* Of the United States Court of Appeals for the Federal Circuit, sitting by designation pursuant to 28 U.S.C. § 291(a).

The Court, *en banc*, will resolve this question on briefs and without oral argument. The parties are directed to file briefs not to exceed 20 pages in length, whether printed or reproduced by any other process authorized by the General Rules of this Court, by September 9, 1985. An original and 30 copies of each brief, with appropriate yellow covers, shall be hand-delivered to the Clerk's Office by 4:00 p.m. that date. No brief in response or in reply will be permitted absent specific request by the Court.

Per Curiam
For The Court

George A. Fisher
Clerk

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1856

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
Appellant,

v.

INTERNAL REVENUE SERVICE, *et al.*,
Appellees.

Thursday, December 5, 1985
Washington, D.C.

The above-entitled matter came on for oral argument, pursuant to notice, at 10:30 a.m.,

BEFORE:

CHIEF JUDGE ROBINSON, CIRCUIT JUDGES WALK, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA, STARR, AND SILVERMAN.

APPEARANCES:

ROBERT A. SEEFRIED, ESQ., Suite 700, 1718 Connecticut Avenue, N.W., Washington, D.C. 20009; on behalf of Apppellant

JONATHAN COHEN, ESQ., Internal Revenue Service, Washington, D.C. 20530; on behalf of Appellee

CONTENTS

PROCEEDINGS

THE CLERK: No. 83-1856, Church of Scientology of California, Appellant, v. Internal Revenue Service, *et al.*

Robert A. Seefried, Esq., for appellant; and Jonathan Cohen, Esq., pro hac vice, for appellee.

THE COURT; Mr. Seefried, you may proceed.

ORAL ARGUMENT OF ROBERT A. SEEFRIED, ESQ., ON BEHALF OF APPELLANT

MR. SEEFRIED: Thank you, Your Honor. My name is Robert Seefried and I am representing the appellant in this case and, with the Court's permission, I would like to reserve approximately three or four minutes for possible rebuttal argument.

The issues that we have been asked to address today concern not only the effective administration of the Freedom of Information Act but concern the goals and policies underlying the enactment of that Act by Congress.

The agency involved in this case today, the IRS, is the one governmental agency that affects every single individual in this country, organization, association, corporation or any other entity.

The result they are asking this Court to achieve today would in effect virtually exempt them from the Freedom of Information Act and give them carte blanche to withhold from disclosure any information that they gather during the important perhaps, there is the point that in a form that is not the same words that are used elsewhere in 6103.

QUESTION: But they are used elsewhere in other sections.

MR. COHEN: That is true.

QUESTION: And you don't assert there that they are used in such a sense that the Service has to have itself aggregated information or placed—

MR. COHEN: No, but that goes to your point which is that once it is in the Service's possession in a form that indeed

identifies directly or indirectly a taxpayer, it becomes return information. It is not some totally unrelated scrap of paper.

QUESTION: That's fine, but my point goes a bit beyond what you are arguing here and I would like to know how much difference it makes to you. That is to say you insist that somehow there have been some operations performed upon the data by the IRS, some aggregation or—

MR. COHEN: For the tax model and things like that?

QUESTION: Right.

MR. COHEN: Yes.

QUESTION: Right.

MR. COHEN: That is true.

QUESTION: Whereas the interpretation I was—the alternate interpretation I was suggesting, which I find much more easy to derive from the simple language of the provision which I tend to go by, is whether you have done the work that has taken the name off of it or not, if it is in your possession in such a form that it does not identify—

MR. COHEN: I think you are absolutely right. I don't disagree with that at all. If it is raw data, whether we have penciled things in on it or averaged it with its two neighbors on either side, if it is raw data it is return information. It does not lose that character until something is done to it.

QUESTION: Well, you are not agreeing.

MR. COHEN: I am.

QUESTION: That is not what Judge Scalia said.

MR. COHEN: Then I must have missed—

QUESTION: Then you are making another argument and that is precisely the problem.

MR. COHEN: Then I am sorry, I misunderstood you.

QUESTION: Suppose you have information somebody has submitted to you or you have gotten in the process of your investigation a statistical piece of paper that doesn't have a taxpayer's name on it, you can't identify the individual taxpayer.

MR. COHEN: It is itself a statistical piece of evidence.

QUESTION: Right. Why wouldn't that meet the language of the Haskell Amendment? The only difference being you are not the one that did the aggregation that derived those figures.

MR. COHEN: I think that would—

QUESTION: It came in the mail to you, a tax return with the taxpayer's name off of it.

MR. COHEN: In other words, someone sends in a piece of paper that has no identification characteristics on it—

QUESTION: It is in your files.

MR. COHEN: —we would have no way of—it would be hard to see how that would be return identification in the first instance, because I don't think it would fit within any of the other categories of 6103. It wouldn't be something from which we would determine liability or assessments or deductions. It would fail in the first place, but I—

QUESTION: You have been to somebody's office in the course of taking over corporate records, and this piece of paper is among them, it has been acquired in the course of a—

MR. COHEN: I think that would certainly be return information, absolutely.

QUESTION: Even though there is no name on it?

MR. COHEN: Well, I think it would be in a form that we could by virtue of the fact that it goes to the liability—it has no identification at all, all it is is a sheet of paper—

QUESTION: A sheet of figures.

MR. COHEN: I don't know. Again, I think you would flunk out on the first part of the language of 6103 that it could not be used for the computation of the liability of a particular taxpayer.

QUESTION: Let's assume you flunk you, it is not under return information, what procedure would you follow?

MR. COHEN: In terms of—

QUESTION: I suppose IRS still refuses to disclose it even though it is clearly not return information. What is the procedure?

MR. COHEN: I would assume that under those circumstances it would clearly be an abuse of discretion and the Service would be obliged to cough it up by an appropriate—

QUESTION: Are you under FOIA or are you under APA?

MR. COHEN: We would submit that the proper approach would be that we are under the APA standard, that we are under 6103, but we have the burden, we concede that we have the burden of showing that material is return information . I don't think there is any way we can duck that burden, and if we don't carry that burden then I think the court's inquiry ends. I don't think for a minute that we can hide behind some kind of stone wall. Let me try to disabuse the Court of that notion. And I think that—

QUESTION: It would be under FOIA if it is not covered by 6103.

QUESTION: You just gave an answer that is contrary to your reaffirmation.

MR. COHEN: It if were not return information, then the question would be if it would fall under FOIA, under one of the FOIA—

QUESTION: The appellant keeps insisting and keeps claiming that everything you have in your files is return information. That is not the—

MR. COHEN: Absolutely not. We are not—

QUESTION: Give us an example other than the tax model, because one of the amicus briefs suggests that there are a whole range of documents that have been available to the public and would not be available were we to adopt your current interpretation.

MR. COHEN: No, I can't, other than the statistics of income. There has been some hint in one of the amicus briefs that certain audit surveys, for example, were released. I can't say that there is a standard practice to make available to the public material of a particular type or a particular title. The only two that I am prepared to speak to are the tax model and the statistics of income, and I—

QUESTION: Let me go back to a hypothetical question. Frequently a congressional committee, the Finance Committee will request statistical information from you and you will submit that, but that clearly is not return information, and you concede to that.

MR. COHEN: Absolutely.

QUESTION: Now, suppose in turn, as frequently happens, Congress works on those figures and prepares a revenue tax statement or something and submits it to the IRS for their review and then it goes into your files, now that is not a statistical analysis you prepared—

MR. COHEN: That's true.

QUESTION: —but that would certainly be releaseable?

MR. COHEN: I would think so. As I read 6108, I wouldn't have any trouble at all saying that should be releaseable.

QUESTION: But not by reason of the Haskell Amendment?

MR. COHEN: Right. It would be releaseable entirely under a separate statutory—

QUESTION: Wait a minute, Haskell was for a totally different purpose.

MR. HASKELL: At least in that context. What Haskell—

QUESTION: How does it get releaseable? If all 6108 says is that the IRS must prepare a statistical summary every year, now if there are ten of these, keep nine, release one and it would have fully complied with 6108, couldn't it?

MR. COHEN: Yes.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1856

CHURCH OF SCIENTOLOGY OF CALIFORNIA, APPELLANT

v.

INTERNAL REVENUE SERVICE, ET AL.

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 80-03239)

Argued April 11, 1984

Decided May 27, 1986

Robert A. Seefried for appellant.

Richard Wyndon Perkins, Attorney, Department of Justice, with whom *Glenn L. Archer*, Assistant Attorney General, *Joseph E. diGenova*, United States Attorney, *Michael L. Paup* and *Stephen Gray*, Attorneys, Department of Justice, were on the brief, for appellees.

Before: WRIGHT and SCALIA, *Circuit Judges*, and FRIEDMAN,* *Circuit Judge* of the United States Court of Appeals for the Federal Circuit.

Opinion for the Court filed by *Circuit Judge* SCALIA.

SCALIA, *Circuit Judge*: This case arises out of the efforts of the Church of Scientology of California to obtain documents from the Internal Revenue Service under the Freedom of Information Act, 5 U.S.C. § 552 (1982) ("FOIA"). It requires us to review the District Court's grant of summary judgment to the IRS on the adequacy of its response to the Church's FOIA request. To do so we must consider, among other things, the relation between FOIA and the provisions of the Internal Revenue Code that govern disclosure of return information, 26 U.S.C. § 6103 (1982).

I

On May 16, 1980 the Church sent a Freedom of Information request to the IRS. It comprises seven single-spaced typed pages and is extremely confused, but for purposes of this appeal it has been adequately summarized by the Church as essentially requesting:

> 1. All documents or records "relating to or containing the names of Scientology, Church of Scientology, any specific Scientology church or entity identified by containing the words Scientology, Hubbard and/or Dianetics in their names, L. Ron Hubbard or Mary Sue Hubbard," which could be located in a number of systems of records or files specifically identified in the FOIA request, "including but not limited to those located at the National Office, Regional Offices, Service Centers, District offices or Local IRS offices."
>
> 2. All documents generated, received or which otherwise came into the possession of the IRS subsequent

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* Sitting by designation pursuant to 28 U.S.C. § 291(a).

> to the preparation of an index in a tax case involving the Church of Scientology of California pending in the United States Tax Court, *Church of Scientology of California v. Commissioner of IRS*, Docket No. 3352-78 (U.S.T.C.) [referred to below as the "Tax Court case"].

Brief for Appellants at 1-2.

The IRS's first response, dated July 22, 1980, requested additional time to "locate and consider releasing the Internal Revenue Service records to which you have requested access" and estimated that the Service would respond on August 29. On September 17, 1980, a response still not having been received, the Church filed an appeal to the Commissioner. After the IRS acknowledged but failed to respond to the appeal, the Church filed a complaint in the United States District Court for the District of Columbia on December 18, 1980 under 5 U.S.C. § 552 (a)(4)(B) (1982). In January 1981 the IRS finally responded to the Church's request with a letter. For the sake of simplicity, we will limit our summary of that response to those factors that have some bearing on the issues here.

The IRS noted that it had limited the scope of the Church's request to documents pertaining to the California Church because the Church had not provided authorizations from any other Scientology entity nor from the Hubbards. Geographically the Service had limited the search to the National Office, the Covington, Kentucky, office and the Los Angeles office. The IRS claimed that all documents relating to the Tax Court case not previously released were exempt from disclosure under Section 6103(e)(7) because disclosure would seriously impair Federal tax administration. It released in full some national office documents acquired subsequent to the Tax Court case index, but justified only partial release of other National Office documents on grounds that they were outside the scope of the appeal, that their disclosure

would cause a clearly unwarranted invasion of privacy, *see* 5 U.S.C. § 552(b)(6), or that they reflected return information of third parties, *see* 26 U.S.C. § 6103(a).

After the IRS answered the complaint, the Church moved for an order requiring the IRS to prepare a *Vaughn* index of the withheld documents, *see Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), but the District Court denied the motion. Instead it ordered submission for in camera inspection of: (1) twenty-six documents located in the National Office which contained portions alleged to be exempt under 5 U.S.C. § 552(b)(6) because their disclosure would constitute an unwarranted invasion of personal privacy; (2) three documents located at the National Office for which exemption was claimed under Section 6103(e)(7) because their disclosure would impair federal tax administration; and (3) all documents generated in connection with the Tax Court case.[1] After in camera inspection of some 5,600 pages of documents, the District Court granted the IRS's motion for summary judgment and dismissed the action with prejudice in June 1983. The Church appealed. We have jurisdiction under 28 U.S.C. § 1291 (1982).

II

The first issue we must address is the relation between FOIA and Section 6103. The Church argues that Section 6103 gives rise to an exemption from disclosure only

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[1] In its opinion, *Church of Scientology of California v. IRS*, Civil No. 80-3239, slip op. at 12-18 (D.D.C. June 24, 1983), the court speaks of eight documents parts of which were withheld under the personal privacy exception, three documents parts of which were withheld because they dealt with third-party return information, and four documents parts of which were withheld because they were outside the scope of the plaintiff's request. The record does not explain the discrepancies between the number and type of documents ordered lodged in camera and the number and type of documents discussed in the court's opinion; but those discrepancies are not important for our disposition of this case.

under FOIA Exemption 3, 5 U.S.C. § 552(b)(3), and subject to the procedural provisions of FOIA, including its de novo review requirement. The IRS urges us to affirm the District Court's holding that Section 6103 totally supersedes FOIA and provides the exclusive criteria for release of records affected by that section, so that courts must uphold any IRS refusal to disclose under Section 6103 that is not arbitrary or capricious and does not violate the other provisions of the Administrative Procedure Act.

The IRS relies principally on *Zale Corp. v. IRS*, 481 F. Supp. 486 (D.D.C. 1979), which has been followed by the Sixth and Seventh Circuits, *see White v. IRS*, 707 F.2d 897, 900 (6th Cir. 1983); *King v. IRS*, 688 F.2d 488, 495-96 (7th Cir. 1982). We cannot agree with those decisions. FOIA is a structural statute, designed to apply across-the-board to many substantive programs; it explicitly accommodates other laws by excluding from its disclosure requirement documents "specifically exempted from disclosure" by other statutes, 5 U.S.C. § 552(b)(3); and it is subject to the provision, governing all of the Administrative Procedure Act of which it is a part, that a "[s]ubsequent statute may not be held to supersede or modify this subchapter . . . except to the extent that it does so expressly," 5 U.S.C. § 559.[2] We find it impossible to conclude that such a statute was *sub silentio* repealed by § 6103. Insofar as is relevant to the issue here, the latter enactment does no more than what is done by *all* nondisclosure statutes covered by Exemption 3: it prohibits the disclosure of certain information (returns and return information). It differs from most other nondisclosure statutes only in that it specifies lengthy exceptions to its rule of nondisclosure. Not generally, but only in the painstaking detail of these exceptions, can it be considered—what *Zale* called it, 481 F. Supp. at 489—a "comprehensive scheme." But that sort of comprehensiveness has nothing to do with the appropriateness of continuing application of FOIA. Even the simplest nondisclosure statute, which makes *no* exceptions, is "comprehensive" in *that* sense—brief but comprehensive instead of lengthy and comprehensive. It would be another matter if § 6103 established some rules and procedures—duplicating those of FOIA—for individual members of the public to obtain access to IRS documents. But it does not. The entirety of its "comprehensive" detail relates to exceptions from the prohibition of disclosure—and even all of these, with three minor exceptions, *see* § 6103(k)(1), (3); § 6103(m)(1), pertain to disclosure to specified private individuals (*e.g.*, the taxpayer to whom the information relates) or government officials, rather than to the public at large. That is to be contrasted with § 6110, enacted at the same time as § 6103, which specifically requires that IRS written determinations be "open to public inspection," and establishes procedures to obtain and restrain disclosure, time limits, the level of assessable fees, and an action to compel or restrain disclosure in the Claims Court. That scheme *is* a "comprehensive" one in the relevant sense—that is, in the sense of duplicating and hence presumably replacing the dispositions of FOIA. (Significantly, Congress did not leave us to speculate whether it was comprehensive enough to constitute an implicit *pro tanto* repeal of FOIA; the last subsection specifies that the prescribed civil remedy in the Claims Court shall be the exclusive means of obtaining disclosure, § 6110(*l*).)

From what has been said, it should be clear that we do not share *Zale*'s concern over our "duty to reconcile" FOIA and § 6103, 481 F. Supp. at 488, or over preventing FOIA from "negat[ing], supersed[ing], or otherwise frustrat[ing] the clear purpose and structure of § 6103,"

[2] We do not suggest that an earlier Congress can limit the manner in which a later Congress may express its legislative acts. This provision, like any other, can presumably be repealed by implication. But it assuredly increases the burden that must be sustained before an intent to depart from the Administrative Procedure Act can be found.

id. at 489. The two statutes seem to us entirely harmonious; indeed, they seem to us quite literally made for each other: Section 6103 prohibits the disclosure of certain IRS information (with exceptions for many recipients); and FOIA, which requires all agencies, including the IRS, to provide nonexempt information to the public, establishes the procedures the IRS must follow in asserting the § 6103 (or any other) exemption. Of course FOIA can loosely be said to "frustrate" the purposes of § 6103 in that it places upon the IRS the burden of sustaining its claimed exemption in de novo judicial review. But if that sort of frustration requires the conclusion that § 6103 must have been intended to supersede FOIA, then *all* subsequently enacted nondisclosure statutes supersede FOIA, and Exemption 3 has no application except to statutes already on the books when FOIA was passed—a state of affairs no one has suggested. For these reasons, and for some further reasons discussed in Judge Sirica's opinion in *Britt v. IRS*, 547 F. Supp. 808, 809-13 (D.D.C. 1982), a decision of our district court subsequent to *Zale* and reaching the opposite conclusion, we hold, in agreement with the Fifth and Eleventh Circuits, that Section 6103 does not supersede FOIA but rather gives rise to an exemption under Exemption 3, 5 U.S.C. § 552 (b)(3). *See Linsteadt v. IRS*, 729 F.2d 998, 1001-03 (5th Cir. 1984); *Currie v. IRS*, 704 F.2d 523, 526-28 (11th Cir. 1983).

III

The Church objects to the IRS's decision not to search the files of its regional and district offices other than those in Los Angeles and Covington, Kentucky. FOIA requires agencies to make records available in response to any request "made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed." 5 U.S.C. § 552(a)(3)(B). The IRS does not have a central file of records in which copies of all documents in its possession are retained. Its regulations therefore require requests to be made to the office of the

official who is responsible for the control of the records requested, or if the person making the request does not know the official responsible, to the office of the director of the IRS district office in the district where the requester resides. 26 C.F.R. § 601.702(c)(3)(iii) (1984). The regulations specify in some detail which officials are responsible for documents and give their addresses. 26 C.F.R. § 601.702(g).

It is undisputed that the Church did not direct its request to the officials in charge of the documents in regional and district offices, nor to the office of the director of the IRS district office in the district where the Church resides, but rather to the National Office of the IRS. The Service caused a search to be made of the records in its National Office, and in addition (though it was not technically required) of the records in the two field offices particularly pertinent to the Church's operations. In view of the statutory command that requests be made in accordance with published rules, the clarity of those rules, and the reasonableness of the IRS's treatment of the misdirected request, we find no merit in the Church's contention that the IRS's failure to inform it earlier that the request for a search of all district and regional offices was misdirected should have led the District Court to require a search of those offices.

IV

The Church also challenges the IRS's decision to limit the search to files whose titles refer to the California Church. That decision involved two separate but related limitations: (1) restricting the search to those files whose subjects indicate that their contents are related to Scientology, the Hubbards, etc., rather than searching through all files, whatever their subject, that might contain some information responsive to the request; and (2) restricting the search further to those files whose subject is the California Church on grounds that the in-

formation in all requested files on other Scientology organizations, the Hubbards, etc., is return information and therefore exempt from disclosure to the California Church.

The IRS justifies the first restriction on grounds that a request for all information on Scientology in its files fails to meet the statutory requirement of "reasonably describ[ing] such records," 5 U.S.C. § 552(a)(3). It is firmly established that "an agency is not 'required to reorganize [its] files in response to [a plaintiff's] request in the form in which it was made.'" *Goland v. CIA*, 607 F.2d 339, 353 (D.C. Cir. 1978) (*quoting Irons v. Schuyler*, 465 F.2d 608, 615 (D.C. Cir.), *cert. denied*, 409 U.S. 1076 (1972)). "[I]f an agency has not previously segregated the requested class of records production may be required only 'where the agency [can] identify that material with reasonable effort.'" *Id.* (*quoting National Cable Television Association, Inc. v. FCC*, 479 F.2d 183, 192 (1973)). Thus, the IRS would doubtless be within the law in restricting its search to files whose subjects indicate a connection with Scientology. It was not required to search through every file in its possession to see if a reference to Scientology appeared somewhere in it—for example, because a taxpayer claimed a deduction for a contribution to a Scientology organization. However, the problem at this stage of the litigation is that the District Court had only the IRS's generalized assertion that it had examined the appropriate subject files. Indeed, it did not have even that, because of the further limitation restricting the search to the California Church alone, which we will discuss below. In these circumstances, we cannot conclude that the agency sustained the burden of justifying its actions, *see* 5 U.S.C. § 552(a)(4)(B), even with regard to the first limitation. Summary judgment on this point would require an affidavit reciting facts which enable the District Court to satisfy itself that all appropriate files have been searched, *i.e.*, that further

searches would be unreasonably burdensome. Such an affidavit would presumably identify the searched files and describe at least generally the structure of the agency's file system which makes further search difficult. *Cf. Goland v. CIA*, 607 F.2d at 352-53 (agency met its burden of proving that it made a full search in good faith with relatively detailed, nonconclusory affidavits).

But the first limitation was in any event superseded by the limitation to records of the California Church. The IRS does not appear to dispute that the Church's request reasonably describes information directly relating to some other Scientology organizations and contained in files whose titles would enable identification without undue burden. Its decision not to search these files appears to rest exclusively on grounds that they contain only return information protected by Section 6103.

The Church asserts that these grounds are patently inadequate, since (1) return information consists only of data that identify or can be associated with the taxpayer to whom they pertain, (2) FOIA's requirement that "reasonably segregable" portions of otherwise exempt documents must be provided, 5 U.S.C. § 552(b), would mandate production of the data after redaction of material that enables identification or association, and (3) the possibility of redaction can only be assessed on a document-by-document basis. The crucial first premise of this argument has been considered by this court en banc and, by an opinion issued simultaneously with the present opinion, has been rejected. *Church of Scientology v. IRS*, No. 83-1856 (D.C. Cir. May 23, 1986) (en banc). The mere deletion of identifying material will not cause the remainder of the return information to lose its protected status, and document-by-document examination to determine the possibility of redaction for that purpose is therefore unnecessary.

This is still not sufficient, however, to sustain the IRS's bald contention that it need not search the file of any Scientology organization other than the California Church. That contention would be justified only if, as a matter of law, all information in IRS files is return information. That is unquestionably not so. Congress would not have adopted such a detailed definition of return information in Section 6103 if it had simply intended the term to cover all information in IRS files; and we have no authority to substitute the one disposition for the other. Here the Church requested, for example, information from Treas/IRS System Number 26.005, "File of Persons Making Threats of Force or Forcible Assaults." If such a files system exists, it seems unlikely that its contents consist entirely of return information as defined in Section 6103. In any case, before the IRS's claim that all information in the requested files is protected can be upheld, it must make an appropriate showing that all information comes within the statutory definition.

For the reasons just given, the District Court erred in accepting the IRS's blanket assertion that all information responsive to the Church's request in files not relating to the California Church was exempt from disclosure. This does not mean, however, that the IRS must, as the Church would have us hold, prepare a *Vaughn* index of all documents in its files relating to third parties for which it claims an exemption under Section 6103 and Exemption 3. *See Vaughn v. Rosen*, 484 F.2d at 826-29. If the IRS claims that a particular document is exempt from disclosure because it contains information on one of the specific subjects protected by Section 6103—for example, information about deductions claimed by a taxpayer—a *Vaughn* index may be required in order to show that the document does not contain segregable portions that could be disclosed without revealing such information. When, however, a claimed FOIA exemption consists of a generic exclusion, dependent upon the category of records rather

than the subject matter which each individual record contains, resort to a *Vaughn* index is futile. Thus, in *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), the Supreme Court upheld, without any provision of a *Vaughn* index, the Labor Board's refusal to provide under FOIA witness statements obtained in the investigation of pending unfair labor practice proceedings. A *Vaughn* index would have served no purpose since, as the Court held, Exemption 7(A), which excludes from required disclosure "investigatory records . . . to the extent that the production of such records would . . . interfere with enforcement proceedings," 5 U.S.C. § 552(b)(7)(A), did not require a showing that each individual document would produce such interference, but could rather be applied generically, to classes of records such as witness statements. *See also Campbell v. Department of Health and Human Services*, 682 F.2d 256, 265 (D.C. Cir. 1982) (government required to provide affidavits but not *Vaughn* index to establish applicability of Exemption 7(A)); *Brinton v. Department of State*, 636 F.2d 600, 606 (D.C. Cir. 1980) (invocation of the deliberative process exclusion of Exemption 5 upheld on the basis of affidavits and no index); *Mervin v. FTC*, 591 F.2d 821, 826 (D.C. Cir. 1978) (invocation of the attorney's work product exclusion of Exemption 5 upheld on the basis of affidavit and no index); *Barney v. IRS*, 618 F.2d 1268, 1272-74 (8th Cir. 1980) (invocation of Exemption 7(A) upheld on the basis of affidavits and no index). If, therefore, the Commissioner's assertion of a Section 6103 exemption rests upon such generic grounds, he will ordinarily be able to make the requisite showing with an affidavit sufficiently detailed to establish that the document or group of documents in question actually falls into the exempted category. Some portions of § 6103 are plainly susceptible of such generic application—particularly that portion which defines protected return information to include all information, no matter what its subject, "received by, recorded by, prepared by, furnished

to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense," 26 U.S.C. § 6103 (b) (2) (A).

In light of the foregoing discussion, the IRS must either conduct a new search for information responsive to the Church's request that refers to third parties or establish through affidavits that all information about third parties in identifiable files requested by the Church is generically protected by Section 6103. If a new search produces any third party information responsive to the Church's request, the IRS must either disclose it or justify withholding it in light of one of the FOIA exemptions through affidavits and, where necessary, *Vaughn* indices.

The IRS's search uncovered a large number of documents responsive to the Church's request and relating specifically to the California Church. It claimed exemption for the majority of these documents—concretely the Tax Court case documents—on the ground that disclosure "would seriously impair Federal tax administration," 26 U.S.C. § 6103(c). Selected portions of a much smaller group of documents not related to the Tax Court case were withheld under various FOIA exemptions because they contained personal information or third party return information, or because they exceeded the scope of the Church's request. The Court upheld the IRS's claim of exemption on the basis of *in camera* examination of a representative sample of the documents, without the benefit of detailed public affidavits or indices.[4] While *in*

[4] The District Court does mention that the IRS indexed twenty-one documents located in its National Office, but its opinion seems to suggest that the court relied entirely upon *in camera* examination. *See Church of Scientology of California v. IRS*, *supra*, slip op. at 12-13.

camera, individual inspection of each of a small number of documents without detailed public affidavits and *Vaughn* indices is sometimes acceptable, *see Currie v. IRS*, 704 F.2d at 530-31, such an approach cannot be applied to large numbers of documents—much less to large numbers of documents that represent only a sampling. It places unrealistic and unsustainable demands upon the trial court and the reviewing appellate panel, and therefore must be replaced or supplemented by the adversary testing which public affidavits and indices seek to provide. *See Vaughn v. Rosen*, 484 F.2d at 825. With respect to these documents, therefore, the District Court should have required the IRS to sustain its burden of proving that the documents it sought to withhold were exempt from disclosure through an appropriate combination of detailed public affidavits and (if necessary) indices, resorting to *in camera* examination of documents and affidavits only where these proved inadequate. We note in this regard that the asserted exemption for documents whose disclosure "would seriously impair Federal tax administration," 26 U.S.C. § 6103(c), is analogous to the exception at issue in *Robbins*, *supra*, for documents whose disclosure would "interfere with enforcement proceedings," 5 U.S.C. § 552(b) (7) (A), and like that exemption should be sustainable generically, as applied to certain categories of documents, on the basis of affidavits and without *Vaughn* indices.

The order of the District Court is vacated and this case is remanded to the District Court for further proceedings consistent with this opinion. At the conclusion of such proceedings, the Church may renew its motion for an award of attorney fees if it so desires.

So ordered.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1856

CHURCH OF SCIENTOLOGY OF CALIFORNIA, APPELLANT

v.

INTERNAL REVENUE SERVICE, ET AL.

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 80-03239)

Argued En Banc December 5, 1985

Decided May 27, 1986

Robert A. Seefried for appellant.

Jonathan Cohen, Attorney, United States Department of Justice, of the Bar of the Supreme Court of Connecticut, pro hac vice, by special leave of the Court, with whom *Glenn L. Archer, Jr.*, Assistant Attorney General, United States Department of Justice, *Joseph E. diGenova*,

United States Attorney, and *Michael L. Paup, Richard W. Perkins* and *Murray S. Horwitz*, Attorneys, United States Department of Justice, were on the brief, for appellee.

James H. Lowe was on the brief for the American Civil Liberties Union Foundation of Washington, amicus curiae, urging adherence to the interpretation adopted by the panel opinion in *Neufeld v. IRS*.

David C. Vladeck and *Alan B. Morrison* were on the brief for John L. Neufeld and the Freedom of Information Clearinghouse, amici curiae, urging adherence to the interpretation adopted by the panel opinion in *Neufeld v. IRS*.

Before: ROBINSON, *Chief Judge*, WRIGHT, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA, STARR and SILBERMAN, *Circuit Judges*.

Opinion of the Court filed by *Circuit Judge* SCALIA.

Concurring opinion filed by *Circuit Judge* SILBERMAN.

Dissenting opinion filed by *Circuit Judge* WALD, with whom *Chief Judge* ROBINSON and *Circuit Judge* MIKVA join.

SCALIA, *Circuit Judge*: This is an appeal from the District Court's grant of summary judgment in favor of the Internal Revenue Service, in a Freedom of Information Act suit brought by the Church of Scientology under 5 U.S.C. § 552(a)(4)(B) (1982). The only issue addressed by this en banc opinion is the meaning of the so-called Haskell Amendment, which excepts from the Internal Revenue Code's definition of nondisclosable "return information" "data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer." 26 U.S.C. § 6103(b)(2) (1982). Specifically, we consider whether to adhere to a 1981 panel decision of this court which held that that provision removes from the defined category of protected information all material which, either in its original form

or as redacted in response to a FOIA request, does not disclose the identity of the taxpayer to whom it pertains.

I

The facts of the present case are set forth in the panel opinion issued simultaneously with this opinion. For present purposes, it suffices to recite that the central issue in the appeal is the adequacy of the IRS's search for requested records; that one of the principal points bearing upon that issue is whether certain files could reasonably be excluded from the search as containing only "return information"; and that the latter point depends to a considerable extent upon whether redaction (specifically, elimination of portions of documents that would disclose the taxpayer's identity) removes the material from the protected category.

After the case had been briefed and argued before the assigned panel, the court en banc, on its own motion, requested supplemental briefing and, on December 5, 1985, heard oral argument limited to the following issue: [1]

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[1] Judge Wald's dissent expresses concern over "the court's recent practice of issuing en banc opinions on legal issues, as opposed to concrete factual scenarios, *see also Foster v. United States*, 783 F.2d 1082 (D.C. Cir. 1986) (en banc)." Dissent at 1 n.1. That concern must logically extend, of course —and should indeed have heightened application—to the court's common practice of rendering en banc decisions on isolated legal issues *without* en banc rehearing, by means of a so-called "*Irons* footnote" added to the panel opinion, reflecting the fact that departure from prior law of the circuit has been approved by the full court. *See, e.g., Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 75 n.24 (D.C. Cir. 1984); *In re: Commodity Futures Trading Comm'n*, 738 F.2d 487, 496 n.19 (D.C. Cir. 1984); *Irons v. Diamond*, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981). Indeed, it must logically extend to the even more venerable practice of en banc *reconsideration* of issued panel opinions limited to specific issues—a practice we indulged in only a few weeks ago. *See Northern*

Should the Court adhere to the interpretation of 26 U.S.C. § 6103(b)(2) adopted by the panel opinion in *Neufeld v. IRS*, 646 F.2d 661, 665 (D.C. Cir. 1981), or should it adopt a different interpretation, in particular that announced by the Seventh Circuit in *King v. IRS*, 688 F.2d 488, 490-94 (7th Cir. 1982)?

Briefs *amicus curiae* were received from the American Civil Liberties Union Foundation of Washington and from Professor John L. Neufeld and the Freedom of Information Clearinghouse.

Natural Gas Co. v. FERC, No. 84-1516 (D.C. Cir. Mar. 27, 1986) (order granting rehearing en banc "for the limited purpose of deciding whether the Court should reconsider its holding in *Panhandle Eastern Pipe Line Co. v. FERC*, 613 F.2d 1120 (D.C. Cir. 1979)").

The practice of segregating legal issues requiring the attention of the full court from the remainder of the case reflects the fact that appellate review serves a dual purpose: the correction of legal error and the establishment of legal rules for future guidance. Only the latter is ordinarily worthy of the attention of the full court. The dissent's perception that judges "typically" dispose of all the issues in a case, *see* Dissent at 1 n.1, is simply not true at the second appellate level, where the law-clarifying function predominates. The Supreme Court often, if not usually, grants certiorari only on one or more discrete points of law, and issues its opinions (in that sense) on "legal issues, as opposed to concrete factual scenarios." En banc consideration (or *Irons* footnote disposition) effectively constitutes such second-level appellate review—at least where, as is the case here, the full court has before it the full text of a proposed panel opinion. It would be especially perverse to abandon our efficient practice of limited en banc disposition just as our caseload has steeply increased, and as the size of the court has been expanded, magnifying the number of judge-hours devoted to each issue handled en banc. The proposal to restrict "piecemeal" consideration would have the effect of making it inordinately difficult to alter prior law of the circuit or to correct panel decisions that adopt erroneous new rules.

II

In relevant part, 26 U.S.C. § 6103(a) provides as follows:

> Returns and return information shall be confidential, and except as authorized by this title—
>
> (1) no officer or employee of the United States,
>
> . . . .
>
> shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. . . .

Willful violation of this provision is a felony. 26 U.S.C. § 7213(a)(1).

"Return information" is defined in the statute as follows:

> (A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, over-assessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and
>
> (B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110,
>
> *but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.*

26 U.S.C. § 6103(b)(2) (emphasis added).

The last clause in the defining paragraph is the Haskell Amendment, so called because it was inserted into the committee-proposed bill through a floor amendment introduced by that Senator. On the basis of that clause, the Ninth Circuit held in 1979 that data that do not identify a particular taxpayer because names, identifying numbers and other similar information have been deleted are not return information. *Long v. IRS*, 596 F.2d 362 (9th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980). In a later case before this court in which the IRS had not briefed the question, the panel found it necessary to reach the issue and, without analysis of its own, followed what was at the time the only court of appeals precedent. *Neufeld v. IRS*, 646 F.2d 661, 665 (D.C. Cir. 1981). In so doing, the panel observed that "[w]hile the IRS wishes to reserve the question of the proper statutory definition of return information for another day, it appears to concede, for this case only, that [no harmful error occurred] if in fact [the district court] employed the definition of return information articulated in *Long*." *Id.* (footnote omitted). Subsequently, the Seventh Circuit reached a conclusion different from *Long*, holding that the statute "protects from disclosure all non-amalgamated items listed in subsection (b)(2)(A), and that the Haskell Amendment provides only for the disclosure of statistical tabulations which are not associated with or do not identify particular taxpayers." *King v. IRS*, 688 F.2d 488, 493 (7th Cir. 1982). The newly emerged circuit conflict has induced us to reconsider the position stated in our 1981 panel decision.

The starting point of analysis, of course, is the text of the provision at issue, which, we agree with the Seventh Circuit, is ill suited to achieve the result pronounced in *Long*. It would be most peculiar to catalogue in such detail, in subparagraph (A) of the body of the definition, the specific items that constitute "return information" (*e.g.*, "income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax lia-

bility, tax withheld, deficiencies, over-assessments, or tax payments, . . . or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return") while leaving to an afterthought the major qualification that none of those items counts unless it identifies the taxpayer. Such an intent would more naturally have been expressed not in an exclusion ("but such term does not include . . .") but in the body of the definition—by stating, for example, that "the term 'return information' means the following information that can be associated with or identify a particular taxpayer: . . . ." If the intended scope of the exclusion is as broad as *Long* holds, the structure of the provision is akin to defining mankind as "all mammals in the world, but excluding those that are not relatively hairless bipeds with the power of abstract reasoning." While such a form of definition is conceivable, it would constitute "everyday language" (as the dissent characterizes it, Dissent at 5) only for one of Lewis Carroll's characters, and it hardly takes "talmudic dissection[]" or "microscopic scrutiny," *id.*, to reject it as implausible.

The *Long* interpretation produces a similarly mindless consequence in subparagraph (B) of the definition of return information. That subparagraph includes within the definition of return information IRS-written determinations and related background files that are *not* open to public inspection under § 6110. The latter section excludes from the public inspection requirement not only identifying data, § 6110(c)(1), but many other matters, such as trade secrets, § 6110(c)(4), information prepared for the use of an agency regulating financial institutions, § 6110(c)(6), and (with respect to most written determinations) material relating to a taxpayer's change of annual accounting period, § 6110(g)(5)(B)(ii). It would be absurd to incorporate these exclusions so precisely into the body of the definition of return information, and then, in the immediately following clause, to write all of them back out—except the identifying data exclusion (§ 6110(c)(1)), which is not deleted by the Haskell exclusion but merely rendered entirely redundant.

We also agree with the Seventh Circuit that the formulation of the Haskell provision itself suggests something other than merely the absence of identifying information. It would be strange to express the latter thought by excluding "data *in a form* which cannot be associated with, or otherwise identify . . . a particular taxpayer" (emphasis added). The emphasized phrase would be superfluous for that purpose, as reading the provision without it will demonstrate. A more natural formulation for the purposes which *Long* assigns would be similar to that contained in the provision of FOIA that "an agency may *delete identifying details*," 5 U.S.C. § 552(a)(2) (emphasis added); or similar to the formulation used elsewhere in this same Subchapter of the Internal Revenue Code, that no publication shall "permit . . . information . . . to be associated with, or otherwise identify, directly or indirectly, a particular taxpayer," 26 U.S.C. § 6108(c). Moreover, it is curious usage to describe an item of return information (a particular taxpayer's tax "payments," for example) as having one "form" when made public in a document that includes the taxpayer's name, and taking a different "form" when made public in the very same document with only the name deleted.

What is suggested by the language of the provision itself is strongly confirmed by other provisions of § 6103. Subsections 6103(f)(1) & (2) and subsection 6103(f)(4)(A) permit disclosure of return information to certain committees of Congress, and subsection 6103(f)(4)(B) to the full Senate or House; under all four provisions, however, unless the taxpayer consents in writing the disclosure must be made to the pertinent committee or house "sitting in closed executive session" when it concerns "return information which can be associated

with, or otherwise identify, directly or indirectly, a particular taxpayer." If *Long*'s interpretation of the Haskell Amendment is adopted, the exception in these provisions completely consumes the rule. That is to say, if return information consists, as *Long* says, of *nothing but* identifying data, then *whenever* it is provided under these provisions the receiving committee or house must sit in executive session. Quite plainly, these provisions contemplate return information that is nonidentifying.[2]

In addition to clear textual indications, rejection of the *Long* interpretation is suggested by assessment of plausible legislative intent. It is of course true, as two of the *amici* have asserted, that there is no reason "why Congress would have wanted to forbid the disclosure of information which would not threaten the privacy of individual taxpayers." Brief of Neufeld and Freedom of Information Clearinghouse at 5. But it is also true that the threat to privacy is *not* entirely eliminated by agency

[2] The dissent refers to all the strange textual consequences of the *Long* interpretation as "stylistic superfluity," which it equates in character with textual imperfections that remain under our interpretation of the amendment. Dissent at 10. The latter, however, consist of nothing more than repetition, in later sections, of the exemption which (under our interpretation) the Haskell Amendment has already provided. This cannot reasonably be compared with the Alice-in-Wonderland definitional structure, *see supra* at 7, the pointless incorporation in the definition of exceptions that have no application, *see supra* at 7-8, and the provisions for open meetings that can never occur, *see supra* at 8-9, that are the consequences of *Long*. The dissent's indiscriminate totaling of textual imperfections also happens to be inaccurate. One of the "superfluities" which it attributes to our interpretation is not that, since the section in question, § 6108(c), is not specifically tied to the term "return information." Moreover, both of the minor imperfections in our interpretation subsist under the *Long* interpretation as well, and the dissent seems to have miscounted the distinctive problems of *Long* we have discussed. The simplistic "score" is not 5-3, as the dissent asserts, but 9-2.

and (ultimately) judicial assessment that certain deletions in response to a FOIA request will suffice to conceal the taxpayer's identity. The protection afforded by such assessment is always problematic, not only because of the risk of human error, but also because the assessment depends to a large extent upon uninformed estimations as to what data the requester possesses. Consider, for example, a FOIA request for the amounts and beneficiaries of all charitable deductions claimed by taxpayers within a particular postal ZIP code area during a particular tax year. That information would normally not identify the charitable gift of any particular taxpayer; but it would do so if the requester had been told by his neighbor that the latter made a charitable gift last year of $2,775.

For most information possessed by the government, Congress has determined that the risk of occasional unknowing disclosure of facts entitled to be withheld under FOIA is outweighed by the benefits of openness. But it has not made that judgment for all information. *See, e.g.*, 50 U.S.C.A. § 431 (West Supp. 1985) (exempting Central Intelligence Agency operational files from FOIA). It is significant that FOIA's nonidentification protection has not been considered adequate for the other major category of personal information that the government directs all its citizens to provide: Under the same Exemption 3 at issue here, 5 U.S.C. § 552(b)(3), all census data are protected from disclosure, whether or not they identify the individual to whom they pertain. *See Baldridge v. Shapiro*, 455 U.S. 345 (1982). We think similarly heightened protection was intended with regard to tax information, in order to encourage the full, voluntary self-assessment of taxes upon which our internal revenue system largely depends.

The intent to provide this increased assurance of confidentiality is conveyed by the detailed provisions of § 6103 rigidly restricting the use of tax information within the government itself, and by the severe crimi-

nal penalty (up to five years imprisonment) for unlawful disclosure. *See* 26 U.S.C. § 7213(a)(1). It is particularly apparent, however—and the incompatibility of the *Long* interpretation is particularly clear—from the provisions of § 6110, which set forth procedures for public inspection of IRS written determinations and related background files. Unlike most governmental information obtainable under the Freedom of Information Act, which one or more members of the public may be interested in for reasons that amount to no more than curiosity, there is special reason for making written determinations public, since without such a requirement agencies could develop "secret law." Thus, FOIA requires such determinations not merely to be provided upon written request, but to be made available in the agency's reading room, and to be reflected in a current index that is publicly distributed. 5 U.S.C. § 552(a)(2). Yet in the case of tax information, § 6110 provides *greater* protection against improper disclosure of this publicly essential information than FOIA provides against disclosure of data in which there is no reason to posit any public need to know. Specifically, the subject of the written determination is given a right to prior written notice of the Secretary's intention to disclose, an administrative remedy to prevent the disclosure, a cause of action in the Tax Court if that remedy is unsuccessful, a right to intervene in any action seeking disclosure, and even a cause of action for damages in the Claims Court for improper disclosure. 26 U.S.C. § 6110(f), (i). In the judicial proceedings to restrain disclosure or to require further disclosure, there is no requirement similar to the provision of FOIA that "the burden is on the agency to sustain" the withholding. *See* 5 U.S.C. § 552(a)(4)(B). It would be absurd to provide such guarantees against disclosure of identifying information in the context of written determinations while relying upon no more than the FOIA protections (through *Long*'s interpretation of the Haskell Amendment) when a request for less publicly important return information is received.

The dissent criticizes our use of standard textual analysis on the ground that, while it may be appropriate where Congress "labored arduously over each choice of word and each comma," it is improper "when the legislative history shows that a provision was injected into the bill at the tail end of the process." Dissent at 5. We need not pause to consider the theoretical deficiencies of such an approach to statutory construction, since it is in any case not properly applicable here. The (ill-considered) Haskell Amendment was not adopted separately and distinctly from the other provisions that we seek to reconcile with it. As we noted earlier, it was not an amendment to a preexisting law, but an amendment to the bill as originally presented on the floor. Congress did not pass into law the Haskell amendment *by itself*, but as part and parcel of an exceedingly detailed and complex legislative scheme, on which it *had* "labored arduously over each choice of word and each comma." Since all the provisions were enacted simultaneously, there is no plausible justification for focusing on the hastily considered nature of one of them and ignoring the carefully crafted character of the remainder.

In fact, far from militating in favor of the broad *Long* interpretation, the last-minute and cursory manner in which the Haskell Amendment was proposed and adopted greatly augments the implausibility of that interpretation. The massive effect of the amendment, if *Long* is correct, was to change the scope of protection from all "return information," as carefully and expansively described in § 6103(b)(2), to merely all such information which would identify the taxpayer. That change would not only make superficially nonidentifying information available to FOIA requesters, and thereby frustrate the carefully drawn protections against such disclosure contained in § 6110, but it would also allow such information to be circulated freely within the government (since the defined term "return information"

is central to both those provisions governing public disclosure and those governing inter-agency dissemination). We are asked to believe that this fundamental change in the committee proposal that the members of the Senate had (presumably) studied was made by this brief proviso at the last minute, without any statement by its sponsor that it had an effect upon anything except statistical studies and compilations of data, *see infra* at 16, without a floor vote (it was adopted by consent), without dissent from even a single member of the Senate, and indeed without any comment by any members of the body who might have been present except Senator Long's remark: "Mr. President, I will be happy to take this amendment to conference. It might not be entirely necessary, but it might serve a good purpose." 122 CONG. REC. 24,012 (1976). Rather than embrace this implausibility it would make more sense—if one were to favor the dissent's approach of using supposed inadequacy of consideration as a basis to ignore, rather than seeking to reconcile, textual conflicts—to endorse the position urged by the government, to wit, that all the befuddled Congress meant to do (never mind that the text will not bear it, *see infra* at 17) was to add the tax model to the disclosure exceptions of § 6108.

III

It is much easier to discern what the Haskell Amendment does not mean (*viz.*, what *Long* suggests) than what it does. If, as we have concluded, it does not exclude from the definition of return information *all* nonidentifying data, what particular nonidentifying data does it exclude? Again we think the key is the crucial phrase "in a form." It is significant that this phrase is *not* contained in the provisions discussed earlier which seek—in language otherwise almost identical to the Haskell Amendment—to describe *all* identifying data. *See* §§ 6103(f)(1) & (2); 6103(f)(4)(A) & (B). But

it *is* contained in two other portions of § 6103. Subsection (j), entitled "Statistical use," permits disclosure of return information (1) to the Secretary of Commerce "for the purpose of, but only to the extent necessary in, the structuring of censuses and national economic accounts and conducting related statistical activities authorized by law"; (2) to the Chairman of the Federal Trade Commission, "for the purpose of . . . administration . . . of legally authorized economic surveys of corporations"; and (3) to the Department of the Treasury, "for the purpose of . . . preparing economic or financial forecasts, projections, analyses, and statistical studies and conducting related activities." The last paragraph of the subsection, entitled "Anonymous form," concludes:

> No person who receives . . . return information under this subsection shall disclose such . . . return information to any person other than the taxpayer to whom it relates except *in a form* which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

§ 6103(j)(4) (emphasis added). In this context, the meaning of the emphasized phrase seems clear: It is evidently meant to permit the publication and distribution of the statistical studies, forecasts and surveys that are the purpose of the permitted disclosures to Commerce, the FTC and Treasury. The phrase envisions, in other words, not merely the deletion of an identifying name or symbol on a document that contains return information, but agency *reformulation* of the return information into a statistical study or some other composite product —presumably on the theory that such reformulation gives added assurance that a taxpayer's identity will in fact not be disclosed.

The same meaning fits the other instance in which the phrase "in a form" appears as a disclosure limitation in § 6103. Subsection (i)(7)(A) provides that return information "shall be open to inspection by, or dis-

closure to, officers and employees of the General Accounting Office" for the purpose of conducting legally required audits. Such officers and employees are prohibited, however, from disclosing to others "return information . . . in a form which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer." This seems designed to assure that the reformulations of raw return information in the audit reports prepared by GAO officers and employees, if they are to be made public, be carefully devised to avoid the disclosure of identifying data. Once again the phrase is associated with a *reformulation* of the return information. Significantly, the phrase is not used where the subject of the provision is not "return information" but material that has *already* been reformulated. The concluding provision of § 6108 prescribes that no publication or disclosure of the statistical studies and compilations authorized by that section "shall in any manner permit the statistics, study, or any information so published, furnished, or otherwise disclosed to be associated with, or otherwise identify, directly or indirectly, a particular taxpayer." 26 U.S.C. § 6108(c).

The United States has argued in this appeal that the only type of reformulation that the Haskell Amendment exempts is that envisioned by the last mentioned section. The consequence of this interpretation, of course, is that the Haskell Amendment becomes substantively superfluous, amounting to no more than a reminder in the definition section that § 6108 permits disclosure of statistical data. That alone may not be fatal since, as far as we can discern, *any* interpretation of the amendment, including the one we adopt, creates some redundancy. The insuperable problem, however, is that there is absolutely no textual basis for limiting the phrase "in a form" to the precise types of reformulation set forth in § 6108. It is not likely that such a surgically exact result would be described by that vague term, rather than

by the simple and precise statement that return data "does not include statistical studies and compilations prepared under authority of § 6108." To support the suggested limitation, the government resorts to what the Seventh Circuit in *King* called the "scant legislative history" of the Haskell Amendment, 688 F.2d at 492, consisting principally of the following statement by Senator Haskell on the Senate floor:

> [T]he purpose of this amendment is to insure that statistical studies and other compilations of data now prepared by the Internal Revenue Service and disclosed by it to outside parties will continue to be subject to disclosure to the extent allowed under present law. Thus the Internal Revenue Service can continue to release for research purposes statistical studies and compilations of data, such as the tax model, which do not identify individual taxpayers.
>
> The definition of "return information" was intended to neither enhance nor diminish access now obtainable under the Freedom of Information Act to statistical studies and compilations of data by the Internal Revenue Service. Thus, the addition by the Internal Revenue Service of easily deletable identifying information to the type of statistical study or compilation of data which, under its current practice, has been subject to disclosure, will not prevent disclosure of such study or compilation under the newly amended section 6103. In such an instance, the identifying information would be deleted and disclosure of the statistical study or compilation of data be made.

688 F.2d at 493 (quoting 122 CONG. REC. 24,012 (1976)). As *King* noted, this statement was made in response to a question whether the IRS could avoid disclosing statistical studies simply by adding identifying information, and thus was not *necessarily* intended as a comprehensive expression of the purpose of the amendment (though it assuredly adds no support to the textually implausible

Long interpretation). Even disregarding that limitation, however, the statement simply does not support the government's narrow construction. It refers not only to "statistical studies" but also to "compilations of data, such as the tax model." The latter is not a statistical tabulation but a sample return, derived from an actual return but reformulated to substitute new figures for certain items—a partly actual, partly fictional return, so to speak. There is no way that the tax model can be brought within the publication exemptions of § 6108. Even if the provision of § 6108(b) which permits preparation and disclosure of "special statistical studies and compilations" is interpreted in such fashion that the adjective "statistical" does not modify "compilations" (which seems to us strained), the tax model—which the Secretary had prepared and made public for years before the Haskell Amendment and has continued to prepare and make public since—could not possibly come within that provision, since it is by no stretch of the imagination a "special" compilation prepared "upon written request by any party or parties," as § 6108(b) requires.[3]

[3] The absence of any textual basis in § 6108 for publication of the tax model seems to us a complete response to the concurring opinion's contention that *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 104 S. Ct. 2778 (1984), requires us to defer to the agency's interpretation of the statute. There is some question, to begin with, whether an interpretive theory put forth only by agency counsel in litigation, which explains agency action that could be explained on different theories, constitutes an "agency position" for purposes of *Chevron*. Even granting that principle, however, it cannot possibly have application where counsel's interpretation in fact does *not* explain agency action but is, to the contrary, incompatible with the agency's settled course of conduct. That is the situation here, since the IRS has regularly released, and plans to continue to release, the tax model. Nor does it suffice to appeal to Senator Haskell's explicit reference to the tax model as the agency's justification for this singular departure from its (supposed) § 6108 theory. Legislative

We may add that, for similar reasons, we find no support in text or legislative history for the Seventh Circuit's statement in *King* that "the Haskell Amendment

history is used to clarify the meaning of a text, not to create extra-statutory law. If it can ever be the basis for plainly departing from the text, it assuredly cannot be so when an interpretation that honors both the text and the history is available.

The concurrence claims that agency counsel did not take the position that the Haskell Amendment referred exclusively to § 6108, but rather maintained that the phrase "data in a form" in § 6103 referred exclusively to the statistical studies covered by § 6108 *and* to the tax model. Concurrence at 16. The oral argument contained the following exchange:

> [COUNSEL]: . . . [I]t is certainly arguable that the Haskell Amendment is redundant in light of 6108.
>
> . . . .
>
> QUESTION: . . . Your interpretation of the Haskell Amendment is § 6108?
>
> [COUNSEL]: That's right and that is why Senator Long didn't think it was all that necessary . . . .

Corrected Tr. of Oral Argument at 28 (Dec. 5, 1985). This concession was not, as the concurrence contends, a matter of government counsel's "hav[ing] been momentarily caught off guard by the court's vigorous questioning." Concurrence at 16 n.10. To the contrary, what prompted the concession (and what prompted the questioning) was the carefully considered and frequently repeated assertion in the IRS's brief to the full court that the Haskell Amendment covered only "information . . . amalgamated into statistical data," Supp. Brief for Appellees at 4, 6, and information "likely rendered anonymous by amalgamation into general statistics," *id.* at 9; and that the purpose of the Amendment was "to permit the Internal Revenue Service to continue its collection and release of general statistics," *id.* at 11, and "to permit the release of historically provided statistical data compiled from return information," *id.* at 20. These expressions are subject to no interpretation other than that the Haskel Amendment excludes from the definition of "return information" only the statistical studies and compilations already covered by § 6108.

The problem counsel faced at oral argument was reconciling this theory with the embarrassing fact (first brought

provides only for the disclosure of *statistical tabulations* which are not associated with or do not identify particular taxpayers." 688 F.2d at 493 (emphasis added). We hold, more broadly than *King*, that as used in § 6103 (b) (2) the phrase "data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer" requires—in addition to the fact of nonidentification—some alteration by the government of the form in which the return information was originally recorded. That reformulation will typically consist of statistical tabulation or of some other form of combination with other data so as to produce a unitary product that disguises the origin of its components (as in the tax model). We need not define, for purposes of the present appeal, all other manners of

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to the IRS's attention, evidently, by the Appellant's Supplemental Brief, filed simultaneously with its own) that the tax model is not a statistical study or compilation. We thought, in light of the above-quoted concession at oral argument, that counsel was seeking to mend his hold by adhering to the IRS's original theory of equivalence between the Haskell Amendment and § 6108, but explaining the tax model as a legislative-history-prescribed expansion of what the word "statistics" includes. The concurrence chooses to interpret the discussion as utterly abandoning the position that "data in a form" means statistics only (§ 6108) and embracing instead the view that it means statistics plus (exclusively) the tax model. This merely substitutes for the vice of nontextual amendment to § 6108 the vice of nontextual amendment to § 6103, since in no way can the crucial words "data in a form" be categorically limited to statistical studies, the tax model, and nothing else. (Nor is there any apparent reason why Congress should assume that, of all conceivable nonstatistical amalgamations, only the tax model would be sufficiently helpful and would sufficiently secure anonymity to justify publication.) Whatever position counsel was taking, one thing is clear: it is impossible to find here the sort of clear and consistent agency view (even as purportedly expressed by counsel) that must be given deference.

reformulation that may be included.[4] It suffices to say that the mere deletion of the taxpayer's name or other identifying data is not enough, since that would render the reformulation requirement entirely duplicative of the nonidentification requirement.

We do not pretend that the interpretation we have given the Haskell Amendment causes it to fit with perfect consistency into the body of Chapter 61 or even, less ambitiously, § 6103. It causes the provisions of § 6103 (j) (4) and § 6103 (i) (7) (A), discussed above, to be superfluous. But that superfluity is nothing beside the textual and policy absurdities produced by the interpretation in *Long*—and exceeds the superfluity produced by the government's interpretation only because the latter inexplicably limits its "statistical" restriction to the statistics referred to in § 6108. As we have construed the Haskell Amendment, it creates no more disruption of the carefully drawn statutory scheme than is commonly produced by the dread genre of floor amendment; indeed, with a scheme as detailed as this it is remarkable that the dislocations are not greater. We are persuaded, in any case, that the meaning we have assigned is the meaning most faithful to the text, most compatible with the remainder of the legislation, and most supportable by a plausible legislative intent.

* * * * *

Application of our holding to the facts of the present case, and the other issues presented by the instant appeal, are left to the disposition of the panel, whose opinion is issued simultaneously with this.

So ordered.

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[4] Given the purpose of the reformulation requirement, however—to wit, the increased assurance of anonymity—we can readily opine that it does not include the dissent's example of copying the same data "onto a fresh piece of paper, perhaps in narrative style." Dissent at 7.

SILBERMAN, *Circuit Judge*, concurring: The court confronts in this case a difficult issue of statutory interpretation. The puzzle begins with 26 U.S.C. § 6103 (1982), which provides generally for nondisclosure of "return information" in the interest of taxpayer confidentiality. All sides agree that the heart of this controversy is the proper interpretation of the Haskell amendment, which authorizes the agency to release material that otherwise could not be released because it would be (but for the Haskell amendment) "return information." In other words, what does the phrase "data in a form which cannot be associated with or otherwise identify, directly or indirectly, a particular taxpayer" mean? But I believe there is another question presented of equal importance: Did Congress intend that the IRS's interpretation of what constitutes such "data in a form . . ." be given deference by the judiciary?

I think it must be conceded that Section 6103 is, at the very least, ambiguous as to the issue now before the court. Nothing in the language of the statute itself yields a decisive understanding as to whether *Neufeld* or *King* is a more faithful rendering of the statute's purpose. The legislative history is sparse and inconclusive on the *Neufeld/King* question. Against the backdrop of this ambiguity the parties argue for divergent interpretations of this provision. The agency argues that the Haskell amendment means that data must be amalgamated or combined in a different form (Appellee's Supp. Br. at 5 n.4) and specifically points to data "rendered anonymous by amalgamation into general statistics" as satisfying that test (*Id.* at 9).[1] The agency relies heavily on the adoption of this interpretation by the Seventh Circuit in

[1] The agency's brief did not contend that such statistical information was necessarily limited to the statistical compilations described in Section 6108, nor do I. And at oral argument agency counsel reiterated that the tax model would be included within the agency's construction of the Haskell amendment, as the *King* court had concluded in 1982. *King* treated the tax model as a statistical tabulation. 688 F.2d at 493. In light of the *King* discussion I fail to understand the majority's "surprise" theory. Maj. Op. at 17 n.3.

King and further argues that a broader definition—such as that adopted by the majority—apart from creating certain anomalies and inconsistencies in the statutory scheme, presents troublesome administrative problems. The Secretary, we are told, has grave difficulty in determining the ability of one who requests information to "correlate facially nonidentifying data with specific taxpayers." Appellees' Supp. Br. at 13. The Church, on the other hand, argues that any document in the IRS files that contains return information must be disclosed provided that identifying information is first redacted. Through the majority opinion, this court rejects as excessively narrow the agency's construction of the statute and offers yet another construction. It concludes that the Haskell amendment exempts from the general rule of nondisclosure nonidentifying return information that has also undergone "agency *reformulation* . . . into a statistical study or some other composite product . . . ." Maj. Op. at 14 (emphasis in original). Each of these interpretations is, in my view, a reasonable construction of a difficult statute, but I disagree with the majority's decision to treat its own construction as authoritative. I believe the majority's approach oversteps the limitations on the court's proper role as defined in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The message of *Chevron* is emphatic. A court's duty in matters of statutory construction is to give effect to congressional intent. If that intent is not precisely apparent, however,

> the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether

the agency's answer is based on a permissible construction of the statute.

Id. at 843 (footnote omitted). Beyond this we cannot go.

I believe *Chevron's* instruction applies to the issue of statutory construction now before the court. Section 6103 (b) (2), set out in full in the majority opinion at page 5, defines return information by enumerating several different categories of information, but qualifying the enumeration with the words of the Haskell amendment "but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer." 26 U.S.C. § 6103 (b) (2) (1982). The words of the Haskell amendment seem to me to cry out for application of the doctrine of deference expounded in *Chevron.* No one, it would seem, is better qualified than the Secretary to decide whether certain classes of information may be released in compliance with the Haskell amendment.

I

Before proceeding, I must address a question that the majority raises without answering—"whether an interpretive theory put forth only by agency counsel in litigation, which explains agency action that could be explained on different theories, constitutes an 'agency position' for purposes of *Chevron.*" Maj. Op. at 17 n.3. I think it is much too late to question whether the construction of Section 6103(b) (2) urged by agency counsel in this case really represents the IRS's position. We know that the IRS has been advancing its interpretation in courts throughout the country at least since 1982, when it persuaded the Seventh Circuit in *King* to adopt its position, and perhaps even before then. To suggest in these circumstances that the *King* analysis is *not* an "agency position" is to imply that IRS counsel are mavericks, disembodied from the agency that they represent. I reject that supposition. *See Ashland Oil, Inc. v. FTC*, 548 F.2d 977, 984-85 (D.C. Cir. 1976) (MacKinnon, J., dissenting).

The precept that the agency's rationale must be stated by the agency itself stems from proper respect for the separation of powers among the branches of government. In the seminal case of *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), the Court explained that "a judicial judgment cannot be made to do service for an administrative judgment." *Id.* at 88. Similarly, in *Investment Co. Inst. v. Camp*, 401 U.S. 617 (1971), the Court declined to defer to agency counsel's interpretation, noting that "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands." *Id.* at 628. In these cases, the Supreme Court declined "to substitute [its own] or counsel's discretion for that of the [agency]" because to do so would be "incompatible with the orderly functioning of the process of judicial review. This is not to deprecate, but to vindicate . . . the administrative process, for the purpose of the rule is to avoid 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (citation omitted) (*Chenery II*)). In other words, the doctrine developed as a manifestation of judicial restraint. If courts were to accept an agency counsel's position that significantly differed from the agency's position, they would in effect substitute a judicial interpretation for the agency's.

The doctrine has been applied in a variety of cases. Courts have rejected as inadequate agency counsel's articulation of a statutory interpretation when that interpretation has been inconsistent with a prior administrative construction, *see Securities Indus. Ass'n v. Board of Governors of the Fed. Reserve Sys.*, 104 S. Ct. 2979, 2983-84 (1984); *Pitzak v. OPM*, 710 F.2d 1476, 1479 n.2 (10th Cir. 1983); when the record evidence before the court demonstrates no link between counsel's interpretation and administrative practice, *Alaniz v. OPM*, 728

F.2d 1460, 1465 (Fed. Cir. 1984); or when agency counsel's interpretation is revealed as no more than a "current litigating position." *Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 567 F.2d 1174, 1177 n.3 (2d Cir. 1977); *see* McMillan & Peterson, "The Permissible Scope of Hearings, Discovery, and Additional Factfinding During Judicial Review of Informal Agency Action," 1982 Duke L.J. 333, 363 n.163.[2] And in *Investment Co. Inst. v. Camp*, the Supreme Court declined to credit agency counsel's statutory interpretation, offered in support of an agency regulation, where the Comptroller had "adopted no expressly articulated position at the administrative level as to the meaning and impact" of the relevant statutory provisions. 401 U.S. at 627. Those circumstances are not present in this case, however. The construction of the Haskell amendment was not even a central issue in this case in its administrative phase before the agency. There was no need then for the agency to set forth its position on that issue. It was not until the case came before the district court that the issue arose in any form. There the Church argued that in light of *Neufeld*, which had been decided during the district court litigation, the IRS could not tenably maintain that it need not even search files known to contain return information. The IRS, bound, of course, by the *Neufeld* court's construction of the Haskell amendment, argued to the district court that since the Church's request identified the taxpayer, "no information could be released by the Service that would be anonymous." Defendants' Memorandum in Reply to Plaintiff's Statement of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment at 3. On appeal before the D.C. Circuit panel, the IRS acknowledged that it was

[2] The notion that deference should not be accorded if the agency's interpretation appears to be no more than a "current litigation position" suggests a slightly different but related variation on the original doctrine. But the IRS has, as far as I can tell, always sincerely asserted the *King* interpretation whenever it was appropriate to do so.

bound by *Neufeld*, but urged the court to reconsider *Neufeld* in light of *King*. Thus, at the first moment in the case when it was appropriate and relevant for the IRS to articulate its construction of the statute, it did so. *En banc* consideration of the issue ensued.

What is clear from all this is that the *King* analysis is in no way inconsistent with the basis for the agency's decision in the administrative appeal. *See* Appellee's Panel Br. at 24 n.11. This is not a case like *Investment Co. Inst. v. Camp*. In that case, the Comptroller of the Currency, to whom Congress had only recently reassigned regulatory responsibility for national banks' trust activities, adopted, three decades after enactment of the Glass-Steagall Act, a regulation that departed from a long-settled interpretation of the statute. *See* 401 U.S. at 621-22. The Comptroller plainly neglected to furnish an appropriate rationale for his actions at a stage in the proceedings where there was a compelling need to articulate a link between the statutory provisions and the new regulation. The time to provide a statutory interpretation that underpins a newly promulgated rule that sweeps away earlier interpretations of the statute is obviously at the time of the rulemaking. In informal administrative adjudicative proceedings that evolve into federal court litigation, by contrast, the issues may well be shaped and sharpened throughout the proceedings. I think it is enough that the agency, through its counsel, set forth its interpretation of the statute at the first moment when it was appropriate and relevant to do so.

Were the rule to be otherwise—were the courts to withhold deference unless an agency asserted its interpretation of a statute in a formal adjudication or agency rulemaking—we would be creating a strong incentive for government agencies and departments to undertake their business strictly through formal procedures. Although judicial review of administrative action has seemed in recent times to push in that direction, I doubt that much

good can come of this trend or, more importantly, that it is justified by congressional direction. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). We should take care that a doctrine developed to restrain the judiciary not be transformed to serve as a justification for excessive judicial intervention.

In any event, if this court rejects *King* on the unwarranted assumption that *King* is not the IRS's "true" interpretation of the Haskell amendment, the agency presumably could undercut the court's holding merely by taking some more formal step to adopt *King* as the Commissioner's interpretation of the statute. This strikes me as an unseemly institutional *pas de deux*.[3]

II

FOIA's general policy favors disclosure, but the statute also recognizes nine categories of exemptions from the general rule of disclosure. One of the exemptions, found at Section 552(b)(3), provides that

> (b) This section does not apply to matters that are
> . . .
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this title) provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

5 U.S.C. § 552(b)(3) (1982).

[3] If the agency were formally to adopt the *King* position, let us say through a regulation or interpretive rule, it would surely be entitled to deference before other circuits that have not as yet faced the need to interpret the Haskell amendment. But I really see no inherent reason why it would not be entitled to deference in this court in a new proceeding as well. That prospect suggests that if the majority is uncertain as to whether the *King* analysis is actually the IRS's position, it should order the case remanded to the agency to allow what it regards as an adequate demonstration to that effect.

Thus, the language of Section 552 exempts statutes such as Section 6103[4] from "[t]his section," which I take to mean the entire Section 552 in the absence of any other plausible reference. But Section 552 contains not only the disclosure requirements; it also contains the provision for de novo judicial review. While it is obvious that materials covered by exemption 3 are exempted from the disclosure requirement of Section 552, mere assertion that requested documents are covered by an exemption 3 statute will not serve to immunize items from disclosure. The de novo review section of FOIA requires courts to examine withheld documents to determine whether they are *in fact* covered by an exemption 3 statute. But that cannot possibly mean that the law applied in those proceedings is other than that embodied in the exemption 3 statute. That is to say, the definition or scope of "matters" covered by the exemption 3 statute must derive from the exemption 3 statute. It could come from nowhere else.[5]

[4] We have held that Section 6103 is an exemption 3 statute; that is, it meets the criteria set out in subsection (b)(3). *Moody v. IRS*, 654 F.2d 795, 797 & n.4 (D.C. Cir. 1981); *see Chamberlain v. Kurtz*, 589 F.2d 827 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979); *Fruehauf Corp. v. IRS*, 566 F.2d 574 (6th Cir. 1977); *see also Zale Corp. v. IRS*, 481 F. Supp. 486, 490 n.13 (D.D.C. 1979).

[5] My reading of Section 6103 and FOIA nevertheless differs from the reasoning of *Zale Corp. v. IRS*, 481 F. Supp. 486 (D.D.C. 1979), relied upon by *King*. The *Zale* court held that Section 6103 was a self-contained provision not subject at all to judicial review under FOIA. *Id.* at 489-90. The court held that Section 6103 contained its own standard governing disclosure or nondisclosure of tax return information and that decisions not to disclose were subject to review only under the

I have found nothing in the legislative history of FOIA or its subsequent amendments that contradicts this analysis. The House Report accompanying S. 1160, the bill whose provisions were eventually codified as amended at 5 U.S.C. § 552, explained that "[t]he proceedings are to be de novo so that the court can consider the propriety of the withholding instead of being restricted to judicial sanctioning of agency discretion." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 9 (1966). The Senate Report stated: "That the proceeding must be do novo is essential in order that the ultimate decision as to the propriety of the agency's action is made by the court and prevent [sic] it from becoming meaningless judicial sanctioning of agency discretion." S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965).[6]

Administrative Procedure Act. *Id.* In my view, this analysis goes too far. Section 6103 and FOIA are easily construed together without the need to ignore either provision.

[6] In 1974 and 1976 Congress amended FOIA to clarify the meaning of de novo review and to tighten the focus of certain exemption provisions. To do this Congress explicitly overruled judicial precedents that it viewed as obstacles to fulfilling FOIA's pro-disclosure policy. In the 1974 amendments to FOIA, for example, Congress overruled the Supreme Court's decision in *EPA v. Mink*, 410 U.S. 73 (1973). Congress viewed the Court's holding as having interpreted exemption (b)(1), relating to national security and foreign policy matters, too broadly. Congress clarified in the 1974 amendments that district court judges could conduct in camera inspection of classified documents and need not defer to the agency's decision to label a document classified. *See* S. Rep. No. 1200, 93d Cong., 2d Sess. 9, 12 (1974) (stating intent to overrule *Mink*). Similarly, in 1976, Congress overruled *FAA v. Robertson*, 422 U.S. 255 (1975), which had interpreted exemption (b)(3) to embrace a statute (and by implication a class of statutes) that Congress had not intended to include among those excusing disclosure. *See* H.R. Rep. No. 1441, 94th Cong., 2d Sess. 25 (1976) (stating intent to overrule *Robertson*).

The legislative history of the 1974 and 1976 amendments to FOIA does not discuss the term "de novo review" in any directly relevant respect. But the legislative history of the

But does de novo review mean more than an independent examination of the facts in light of applicable law;[7] is it inconsistent with deference to an agency's reasonable construction of a statute it administers? In other words, must *Chevron* give way whenever a court is charged with de novo review?

1974 amendments does discuss the term in connection with new statutory language that narrowed the scope of exemption (b)(1) and clarified that a district court may order, as part of its de novo review of an agency's withholding determination, in camera review of classified documents. S. Rep. No. 1200, 93d Cong., 2d Sess. 8-9, 11-12 (1974). The Conference Report states that in camera inspection should not be automatically undertaken; that the agency should first receive an opportunity to demonstrate the correctness of its classification decision (the predicate for withholding documents under exemption 1) by means of affidavits. In deference to executive agencies' expertise in national security and foreign policy matters, the conferees stated their intent that courts should "accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record." *Id.* at 12. Thus, Congress recognized that even within the de novo review that it directed courts to conduct under FOIA, there was room for deference to the agency on factual issues relating to the availability of an exemption in a particular case within the agency's delegated area of responsibility.

[7] The term de novo review, as it is used in the general judicial review provision of the Administrative Procedure Act, 5 U.S.C. § 706(2)(F), is limited to an independent review of the relevant facts. Section 706 requires the reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be— . . . (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (Section 706(2)(F) authorizes de novo review in two circumstances only: (1) for adjudicatory agency action, if agency factfinding procedures inadequate; (2) in proceedings for enforcement of nonadjudicatory agency action, court may undertake independent factfinding as to issues not raised before agency).

I have concluded that *Chevron* does apply in such circumstances. The rule of *Chevron* is not a rule of judicial administration for courts to apply in reviewing administrative decisionmaking. It is an articulation of the fundamental principle that when Congress intends to delegate authority to an agency, that purpose demands recognition by the courts. I reason as follows.

In entrusting administration of a statute to an agency, Congress typically delegates to the agency concomitant authority to "fill any gap" that Congress has left. *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). Part of the legislative purpose with respect to a particular statute, then, is Congress' intent that the agency will exercise its delegated authority in fulfillment of the statute's purpose. Courts appropriately defer to an agency's reasonable interpretation of a statute that the agency administers, then, not simply out of recognition of the agency's expertise, but primarily out of respect for congressional intent.

In *Sims v. CIA*, 642 F.2d 562 (D.C. Cir. 1980), this court took an approach contrary to my analysis and treated the issue of statutory construction of an exemption 3 statute as a question of law "reserved ultimately to our determination." *Id.* at 568. In that case, the CIA declined to disclose documents that revealed the names of individuals and institutions that had participated in a controversial research program. The agency argued that the documents were "specifically exempted by statute" from disclosure within the meaning of Section 552(b)(3). The exemption 3 statute upon which the CIA relied was 50 U.S.C. § 403(d)(3) (1982), which authorizes the Director to protect "intelligence sources and methods from unauthorized disclosure." Appellants argued that the institutions and individuals did not constitute "intelligence sources" within the meaning of the statute. Thus, the issue in the *Sims* case, as in this case, turned on construction of a term in the exemption

3 statute. On appeal, this court devised a definition of the term "intelligence sources" after reviewing the statute and its legislative history. The court stated that FOIA authorized the judiciary "to undertake de novo review" not only of "agency determinations that particular records fall within exemption classifications," but also of "agency constructions of applicable statutes." 642 F.2d at 566 (citation and footnote omitted). The court acknowledged that "[b]ecause the term 'intelligence . . . sources' appears in the text of the National Security Act, it is appropriate for us to begin our analysis with the construction proposed by the CIA, an agency chartered by that statute and charged with major responsibility for its administration." 642 F.2d at 568 (citations omitted). The court continued, "But we must not shrink from the responsibility vested in us by Congress. The question presented is one of law reserved ultimately to our determination." *Id.*

The *Sims* court's observations as to the state of the law on deference to administrative agencies' determinations in 1980 were, in my view, overbroad and erroneous. It has always been true that statutory interpretation is a question of law but it is equally true that an agency's construction of its governing statute traditionally has been viewed as entitled to deference in certain contexts. As this court recognized in a case decided after *Sims*, although the "APA appears to require *de novo* review of all questions of law . . . courts almost always accord some deference to an agency's statutory construction." [8] *Office of Communication of the United Church of Christ*

[8] The *Office of Communications* court used the term "de novo" as shorthand for the introductory language in Section 706 that instructs courts reviewing agency action to "decide all relevant questions of law." 5 U.S.C. § 706 (1982). But as the quotation in text makes plain, *Office of Communications* did not purport to hold that such "de novo" determinations were to be made without deference to the agency's statutory interpretation.

v. FCC, 707 F.2d 1413, 1422-23 n.12 (D.C. Cir. 1983); *see Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969); *Unemployment Comp. Comm'n v. Aragon*, 329 U.S. 143, 153-54 (1946); *McLaren v. Fleischer*, 256 U.S. 477, 480-81 (1921); *Webster v. Luther*, 163 U.S. 331, 342 (1896). *Chevron* has put a new gloss on these old truisms. *Chevron* tells us that if congressional intent respecting a statutory provision is not clear, we must not treat the issue of statutory construction as we would treat any other garden variety question of law. We must defer to another institution's determination—that of the agency charged to administer the law—provided, of course, that the agency's determination is reasonable. In this sense, I believe that *Chevron* supersedes the *Sims* court's overbroad analysis.

My view is further reinforced by the Supreme Court's treatment of the definitional issue when *Sims* came before that Court.[9] *CIA v. Sims*, 105 S. Ct. 1881 (1985). Dismissing the court of appeals' definition of "intelligence sources" as too narrow, the Court stated:

> The plain meaning of the statutory language, as well as the legislative history of the National Security Act, . . . indicates that Congress vested in

[9] The court of appeals' decision reported at 642 F.2d 562 (1980) (*Sims I*) set out a definition of the term "intelligence sources" and remanded the case for the district court to apply that definition. After the district court's decision on remand, the case again came before the court of appeals. *Sims v. CIA*, 709 F.2d 95 (D.C. Cir. 1983) (*Sims II*). This court determined that the district court had not properly applied the definition set forth in *Sims I* and reversed and remanded the case. *Id.* at 100-01. The Supreme Court heard the case on the parties' cross-petitions for certiorari.

For a discussion of the *Sims* Court's "implicit view of a limited role for the judiciary" in reviewing agency claims of FOIA exemption 3, *see* Comment, CIA v. Sims: *Supreme Court Deference to Agency Interpretation of FOIA Exemption 3*, 35 Cath. U. L. Rev. 279 (1985).

> the Director of Central Intelligence very broad authority to protect all sources of intelligence information from disclosure. The Court of Appeals' narrowing of this authority not only contravenes the express intention of Congress, but also overlooks the practical necessities of modern intelligence gathering—the very reason Congress entrusted this Agency with sweeping power to protect its "intelligence sources and methods."

Id. at 1887-88. This approach is consistent with *Chevron* insofar as it first undertakes an inquiry as to the clarity of the legislative intent. Having found clear indications of congressional intent in the language of the statute and its legislative history, the Court had no need to move to the next step of the analysis that *Chevron* directs—determining whether the administrative agency had advanced a reasonable interpretation of the statute to which the judiciary should defer. But the Court's recognition of the "practical necessities of modern intelligence gathering" that compelled Congress to delegate to the CIA "sweeping power" to protect "intelligence sources and methods" indicates that the Court's conclusion as to legislative purpose was buttressed by its understanding of the agency's delegated authority and practiced expertise. Similarly, here Congress has delegated to the Secretary of the Treasury authority to administer the federal income tax laws. And Section 6103 is an integral part of the mosaic of those tax laws because it directs the Secretary to protect return information from disclosure. Congress realized that the confidentiality of return information, which taxpayers usually provide voluntarily, is crucial to efficient administration of the tax laws. S. Rep. No. 938, 94th Cong., 2d Sess. 316-19 (1976). Naturally, the Secretary, like the Director of Central Intelligence in *Sims*, is better situated than the courts to determine when disclosure of information is likely to inhibit the collection of that information in the future. For that reason, Congress quite understandably

delegated to the Secretary some responsibility for further refining the meaning of "data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer."

III

Applying the traditional principle of deference, as refined by *Chevron*, to this case, I conclude that we should defer to the agency's interpretation of Section 6103. As noted above, the agency's interpretation of Section 6103 is not an inevitable one but that is not the test. The *Chevron* Court indicated, rather, that when congressional intent is not clear

> a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

467 U.S. at 844 (footnote omitted). Congress' implicit delegation of authority to the agency to refine the definition of "return information" is buttressed by the broad discretion conferred upon the Secretary in another portion of the statute to disclose return information if he determines that such disclosures would not seriously impair administration of the tax system. *See* 26 U.S.C. § 6103(e)(7) (1982) (release of return information to persons having material interest). This instance of statutorily-conferred discretion to disclose, albeit to a limited class of requesters, even information sensitive enough to be categorized as return information suggests that the prior determination of *what constitutes* nondisclosable return information ought to be informed by the agency's expertise.

The majority refuses to defer to the agency's interpretation because it asserts that the agency's practice is inconsistent with its interpretation of the statutory text. Specifically the majority focuses on the government's continued release of the tax model as fatal to its interpretation of the Haskell amendment. However, the majority does not contend that the tax model cannot fit easily within the general phrase "data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer." 26 U.S.C. § 6103(b). That argument would, in any event, be tenuous in light of the explicit statement Senator Haskell made from the floor. He said that the amendment was intended to permit "the Internal Revenue Service [to] continue to release for research purposes statistical studies and compilations of data, such as the tax model, which do not identify individual taxpayers." 122 Cong. Rec. 24,012 (1976) (remarks of Sen. Haskell).

Instead, the majority raises what I view as an artificial textual barrier by ascribing to the government an argument not presented in its brief, and not necessary to its position,[10] that the Haskell amendment is

[10] The majority opinion reproduces a portion of the colloquy at oral argument which it asserts establishes the IRS's position to be that Section 6103 permits release only of the statistical studies referred to in Section 6108. I do not believe that the colloquy, in context, establishes the IRS's position as such.

> THE COURT: Your reading of Section 6103 makes 6108 superfluous.
>
> COUNSEL: Not entirely, but it's certainly arguable that the Haskell amendment is redundant in the light of 6108.
>
> THE COURT: I don't understand that. Why the two if that is what Congress intended to do? . . . As I read it over and over again, it's exactly the same. Your interpretation of the Haskell Amendment is 6108.
>
> COUNSEL: That is right. And that's why Senator Long said he didn't think it was really all that necessary . . . .

Transcript of Oral Argument at 28-29 (Dec. 5, 1985) (conformed to tape recording of oral argument).

Counsel's apparent concession is not all it seems, however. Government counsel appears to have been momentarily caught off guard by the court's vigorous questioning, for counsel made

identical in its scope of disclosure authority to Section 6108 and that Section 6108's text provides no authority

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it abundantly clear in his immediately subsequent exchanges with the court that the IRS's position was not confined to its understanding of Section 6108.

> THE COURT: There is no congressional intention to support that view anywhere.
>
> COUNSEL: . . . I'm sorry, I can't agree with that.
>
> THE COURT: Well, where is it?
>
> COUNSEL: It seems very clear that Haskell was worried that the sweeping language of 6103(b)(2), that maybe legitimate scholarly use, state and local government use of the tax model which had been going on since 1960, would be choked off. "Oh, my God, they've gone too far in defining return information." Well, 6108 was there, to be sure, but Haskell, perhaps not satisfied that one bite would be enough, thought that maybe he ought to have two, and he suggested that under those circumstances, in order to continue to make available for legitimate scholarly use *the tax model and similar studies* it would be important to say, that, well, data in a form that . . . [the court interrupted].

Id. at 29 (conformed to tape recording of oral argument) (emphasis added).

This elaboration is consistent with IRS counsel's earlier statement that "[W]e submit it is very clear that the Haskell amendment was meant to permit the release of *the tax model and similar statistical studies* that were in an amalgamation form . . . ." *Id.* at 25 (emphasis added). It is clear that the IRS never strictly limited its interpretation of the Haskell amendment to the terms of Section 6108. It viewed the Haskell amendment as permitting disclosure of the tax model and "similar statistical studies." This clearly leaves open the possibility of the creation of other statistical studies, outside the scope of Section 6108, whose release would be permitted under the Haskell amendment. I do not contend otherwise, contrary to the majority's suggestion. *See* Maj. Op. at 17 n.3. There may or may not be any statistical studies in existence or contemplated by the IRS that are outside of Section 6108; I do not know, nor did Congress—which, of course, is why (in addition to its authorization of the release of the tax model) the Haskell amendment is not redundant.

to release the tax model. The agency, however, as I understand its position, maintains that the Haskell amendment was intended to authorize disclosure of statistical compilations such as those referred to in Section 6108 *and* disclosure of the tax model, which disclosure is apparently not otherwise authorized by the statute. The legislative history of the Haskell amendment amply supports the government's position that it was designed to authorize the *continued* release of data the government had released prior to its passage.

To be sure, there may not be a great deal of difference between the agency's interpretation of the Haskell amendment, adopted by the Seventh Circuit in *King*, and the majority's rendition. But the rule of *Chevron* requires us not to reason our own way to an interpretation, even if it were one that the agency might find consistent with its own. Rather, *Chevron* requires us to defer to agency interpretations, such as the one at issue here, that merit deference. I am reinforced in my conviction that deference is the appropriate course in this case by the majority's unwillingness to specify the outer boundaries of its own interpretation, Maj. Op. at 19-20, thus presenting this court with a heightened prospect of further litigation focused on the exploration of those boundaries.

On the basis of the foregoing, I concur in the majority's opinion insofar as it overrules *Neufeld*. But I cannot join the opinion insofar as it rejects the agency's interpretation of the statute in favor of the majority's own.

WALD, *Circuit Judge*, dissenting, with whom ROBINSON, *Chief Judge*, and MIKVA, *Circuit Judge*, join:

I.

I dissent from the court's newly adopted interpretation [1] of 26 U.S.C. § 6103(b)(2) saying that the IRS may never disclose data listed in the section even if there is no risk of identification, unless it has been "reformulated". The court reaches that interpretation based on its reading of the text of the Haskell Amendment, inferences it draws from the relationship between that Amendment and other sections of the Code, and its understanding of plausible legislative intent. I believe that these very same factors support a reaffirmance,

[1] Since the en banc court has considered only this discrete legal issue, and has left to the panel the application of its "holding to the facts of the present case," maj. op. at 20, my dissent must similarly focus on the legal issue of 6103(b)(2)'s general meaning. I am concerned, however, that the court's recent practice of issuing en banc opinions on legal issues, as opposed to concrete factual scenarios, *see also* Foster v. United States, 783 F.2d 1082 (D.C. Cir. 1986) (en banc), poses problems. Judges typically do not issue advisory opinions on abstract legal issues because of the case or controversy requirement of Article III. While our practice here does not, of course, technically implicate those provisions, it does, in my opinion, raise some of the dangers that the case or controversy requirement protects against. For example, it is conceivable that a majority of the en banc court might think that this controversy could be disposed of on some narrower, factual ground than a wholesale repudiation of our old definition of § 6103(b)(2). Yet the contours of the issue that was heard en banc practically prevent such an alternative. Unlike Supreme Court review, where the justices review the entire record before deciding whether to hear a specific issue, our practice isolates the legal issue from its factual moorings altogether. I hope that, in the future, the court will be cautious in adopting this kind of piecemeal approach to en banc hearings. "The establishment of legal rules for future guidance," maj. op. at 3 n.1, best emerges out of fullfledged, fact-based adversarial proceedings, not judicial rulemaking.

rather than a rejection, of the interpretation of § 6103(b)(2) previously adopted by this court in *Neufeld* v. *IRS*, 646 F.2d 661 (D.C. Cir. 1981).

I find nothing in the statutory text or structure to support the notion that wholly non-identifying information [2] may not be disclosed unless it has been put in a different "form". Such an extreme and curious requirement is at odds with the majority's own recognition that "there is no reason 'why Congress would have wanted to forbid the disclosure of information which would not threaten the privacy of individual taxpayers.'" Maj. op. at 7 (Quoting Brief of Neufeld and Freedom of Information Clearinghouse at 5). The *Neufeld* approach, in my view, comports best with Congress' balancing of the strong interest in taxpayer privacy and the equally strong interest in disclosure under the Freedom of Information Act whenever taxpayers' privacy rights are not implicated.

The interpretation adopted in *Neufeld* adequately safeguards the privacy concerns that the majority and I share. The court in *Neufeld* explicitly held that "mere deletion of names and addresses" does not automatically open the door for disclosure of items listed in § 6103(b)(2). *Neufeld*, 646 F.2d at 665. Rather, the court remanded the case to the District Court for determination of "what information, other than name and address, poses a risk of identifying a taxpayer", *id.*, with the understanding that the nature of certain documents may render them entirely nondisclosable. *Id.* at 666. *See also Moody* v. *IRS*, 654 F.2d 795 (D.C. Cir. 1981); *Long* v. *IRS*, 596 F.2d 362 (9th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980).

[2] It is essential to note that the disclosability of actual tax returns and other information filed by the taxpayer is not at issue here. Such items are covered by § 6103(b)(1), are not subject to the Haskell Amendment, and are thus wholly immune from disclosure under FOIA's exemption 3.

I agree that the IRS faces a difficult task in determining just when enough information has been deleted to make the taxpayer unidentifiable. This task is no different, however, from the situation agencies often face under the redaction requirement of the Freedom of Information Act, 5 U.S.C. § 552(b), a requirement that applies even with regard to matters otherwise "specifically exempted from disclosure by statute" under FOIA's exemption 3. 5 U.S.C. § 552(b)(3). While I would grant considerable deference to the agency's expertise in determining when even seemingly anonymous tax data might lead the informed requester to identify a taxpayer, I believe that this determination is for the Service to carry out on a case-by-case or, at times, a document class-by-class basis, in the same fashion that the panel opinion accompanying the en banc decision requires the IRS to proceed with respect to documents not listed in § 6103. *See Church of Scientology* v. *Internal Revenue Service* (hereinafter "Panel op."), No. 83-1856, slip op. at 13-15 (D.C. Cir. May 27, 1986).

In changing course so fundamentally, the court must beware of the effect that its decision will have on others who seek to review tax information in pursuit of varied goals. The plaintiff in *Neufeld*, for example, was a professor doing research into the practice of members of Congress, White House staff members, and other high government officials interceding on behalf of taxpayers in ongoing IRS proceedings. Neufeld "specifically disclaim[ed] any interest in information that would directly or indirectly identify individual taxpayers." *Neufeld*, 646 F.2d at 662. *See also Tax Reform Research Group* v. *IRS*, 419 F. Supp. 415 (D.D.C. 1976) (public interest group researching Nixon Administration's actions pressuring IRS with respect to persons perceived as either "friends" or "enemies"). Yet, under the majority's holding today, the IRS is forbidden from disclosing § 6103(b)(2) data in its present form for research purposes

to Neufeld, the Tax Reform Research Group, and countless other legitimate groups and scholars, even if the Service is wholly confident that there is no risk of disclosure whatsoever. Since the majority has failed to carry its burden in demonstrating that Congress intended to establish a distinct, statutory requirement of reformulation, I dissent.

II.

The majority's major premise is that the language of the Haskell Amendment, *i.e.*, "return information . . . does not include data *in a form* which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer," 26 U.S.C. § 6103(b)(2) (emphasis added), means Congress established a "reformulation" requirement. No data listed in § 6103(b)(2) can ever be released unless it is physically put into a different document from that in which the information presently appears in the IRS files. Deletion of any and all identifying material will never be enough.[3] Otherwise, the majority urges, the term "in a form" is made superfluous,

[3] Because it holds that § 6103(b)(2) requires *both* anonymity *and* reformulation, the effect of the majority's holding is not to require any redaction pursuant to FOIA since that statute has been held not to require an agency to create new documents. *See* Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168, 192 (1975); Krohn v. Dep't of Justice, 628 F.2d 195, 197-98 (D.C. Cir. 1980). My approach, by contrast, reads § 6103(b)(2) as not precluding disclosure of data so long as the disclosed data cannot identify the taxpayer. Deletion of identifying information can, under this approach, take certain data out of the "return information" definition, and is thus mandated by the segregation requirement of FOIA. *See Neufeld*, 646 F.2d at 665-66.

Of course, my disagreement with the majority goes far beyond the applicability of the segregation requirement of FOIA. Because of its "reformulation" requirement, the majority forbids disclosure of any return information in its original state, even if the information, without the need for any redaction, is absolutely non-identifying.

"as reading the provision without it will demonstrate." Maj. op. at 8. In my view, however, the term "in a form" is far more easily understood as saying that the *substantive* types of information listed in § 6103(b)(2) are not "return information" if they can be disclosed in a *manner* that cannot identify a taxpayer. Thus, Congress meant to say no more than return information does not include data that, by itself or even in conjunction with other information, cannot be used to identify a particular taxpayer.

One can, of course, make talmudic dissections of everyday language to find hidden and profound implications. Unless statutory language is so clear that it compels a specific result, however, our task in statutory construction is to "ascertain the congressional intent and give effect to the legislative will." *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975). *See generally id.* (" 'In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.' ") (quoting *United States* v. *Heirs of Boisdoré*, 49 U.S. (8 How.) 113, 122 (1849)); *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 542 (1940) (cardinal principle of statutory interpretation is "to give effect to the intent of Congress"). If the history of a statute's enactment reveals that Congress indeed labored arduously over each choice of word and each comma, then it is likewise proper for us to analyze each word and comma with precision. But when the legislative history shows that a provision was injected into the bill at the tail end of the process, and that Congress made no apparent effort to remove every phrase the new amendment may have rendered superfluous, we only frustrate Congress' goals by holding its words up to microscopic scrutiny. Judge Posner has pointed out that overemphasis on construing all statutes so as to avoid surplusage "rests on the unrealistic premise that [they] are drafted with complete economy of language. . . . There is 'useless

surplusage' in contracts as in statutes, *J. C. Penney Co.* v. *Commissioner of Internal Revenue*, 312 F.2d 65, 72 (2d Cir. 1962), and in neither context should a court give effect to it." *White* v. *Roughton*, 689 F.2d 118, 120 (7th Cir. 1982), *cert. den.*, 460 U.S. 1070 (1983). There comes a point when a court must be realistic in deciding whether the drafter was using everyday expressions in the manner that we all do, or was instead creating a technical, statutory requirement. *Cf. American Radio Relay League* v. *FCC*, 617 F.2d 875, 879 (D.C. Cir. 1980) ("courts will not give independent meaning to a word 'where it is apparent from the context of the act that the word is surplusage' ") (*quoting* 2A Sutherland Statutory Construction § 47.37, at 167 (4th ed. C. Sands 1973)); *see generally* 2A Sutherland Statutory Construction §§ 47.37, at 258 (4th ed. C. Sands 1984) (discussing rule that words can be disregarded in statute if context indicates that they were not intended as adding meaning).

The Haskell Amendment was introduced on the floor of the Senate in the closing days of deliberation on a major tax reform act. *See* 122 Cong. Rec. 24,012 (July 27, 1976). The Amendment engendered absolutely no debate.[4] Given this history,[5] or lack thereof, I cannot agree that the three little words "in a form" evince a clear intent of Congress that data otherwise disclosable under the Haskell Amendment because it is non-identifying,

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[4] As the majority points out, the only *substantive* comment made was Senator Haskell's remark about what effect the amendment would have on tax research. *See* Maj. op. at 16.

[5] The House passed no like provision, and the Conference Committee report states only that

> The Senate amendment provides that returns and return information are confidential and not subject to disclosure except as specifically provided by statute. . . . Under the amendment, data in a form that cannot be associated with or otherwise identify a particular taxpayer will not constitute return information.

S. Rep. No. 1236, 94th Cong., 2d Sess. at 476-77 (1976).

cannot be disclosed unless it is somehow "reformulated". The fact is that most information governed by the Haskell Amendment is already likely to be in a form different from that originally submitted to the Service since the actual return submitted by the taxpayer is exempt from disclosure, without regard to identifiability. *See supra* note 2. Conceding as it does that *aggregation* is not essential to fulfill the reformulation requirement, the majority has adopted a wooden test that turns on physical form, and in so doing has attributed an absurd intent to Congress. Under the majority's test, the IRS may only disclose nonidentifying information if it copies it onto a fresh piece of paper, perhaps in narrative style. Yet, there is certainly no evidence that such recopying accomplishes anything that redaction would not.

The majority concludes that Congress would not have used the "in the form" language had it not wanted to create a reformulation requirement. I, on the other hand, believe Congress would have used much clearer language had it wanted to create such an arbitrary and novel reshaping requirement, without a word of explanation on the floor or in the Conference Report. Given its own emphasis on dissecting the statutory language. and avoiding Alice in Wonderland definitional structures, maj. op. at 9 n.2, I am startled by the apparent ease with which the majority is able to read the Haskell Amendment as creating *two separate* definitional elements. Nothing in the structure of the single sentence Amendment supports such a reading, only the majority's insistence on removing any trace of redundancy. Since nothing in the main body of § 6103(b)(2) discusses the "form" that the information is in, I cannot understand how the Haskell Amendment's use of the term "form" can be understood as allowing disclosure only where the information is in a *different* form from what it was originally in. As an Amicus points out, "Congress could hardly have embarked on a more oblique route if its goal was to create such a separate requirement." *Brief of Amici Curiae Professor John L. Neufeld and The Freedom of Information Clearinghouse* at 4.

I do not accept the majority's characterization of our choice here as one between construing a statutory phrase as a meaningful requirement or ignoring the same words as meaningless surplusage. Rather, I see the choice as one between attributing weighty legal significance to a common and inherently vague [6] term that could be just as meaningfully viewed in context simply as a linguistic aide to the Amendment's main requirement of anonymity, and recognizing it for what is is, a transitional technique of drafting. Under either reading, the words make literal sense, and functionally, the reading adopted in *Neufeld* and *Long* is far less eccentric. Thus, unless other indicia compel the result, the language itself does not, in my view, support the imposition of a distinct statutory requirement of reformulation.

But even if Congress *did* intend to create a reformulation requirement, I am at a loss to understand why the majority so conclusorily assumes that deletion of identifying information does not satisfy this requirement. Why is it a "curious usage" to say that a document takes a

[6] Indeed, even the majority is unable to set forth a general test for when information is in a different form. Maj. op. at 13-20. All it is sure of is that deletion is not sufficient and aggregation is not necessary. Yet, somehow, the majority is able to "readily opine" from the purpose of its reformulation test, that mere copying in different language and style is not sufficient. Maj. op. at 20 n.4. The glaring deficiency with the majority's "reformulation" test is that it never specifies from *what* original form the reformulation must be done and just what satisfies the reformulation requirement. The majority refers to "some alteration by the government of the form in which the return information was originally recorded." *Id.* at 19. Yet the IRS obviously has information in its files in hundreds of different developmental stages. For example, notes of an investigation, abstracts of an investigation, list of investigations done in a week, etc. . . . To say that there must be "reformulation" does not at all answer the question of what is an original form to begin with.

different form once deletions of key information have been made? In its original, it is in a form that identifies; once the necessary deletions are made, it is in a form that does not identify. In my view, the common understanding of keeping documents in anonymous form is satisfied once deletions of possibly identifying materials are made. Nothing in the statute indicates that Congress intended the word "form" to mean any more than this.

The majority also argues that it "would be most peculiar to catalogue in such detail, in subparagraph (A) of the body of the definition, the specific items that constitute 'return information' . . . while leaving to an afterthought the major qualification that none of those items counts unless it identifies the taxpayer." Maj. op. at 6-7. Were the entire statute drafted at one time, there might be some merit in this argument. But, as I already pointed out and as the majority concedes, the Haskell Amendment was indeed an afterthought. It is certainly not unusual that a floor amendment makes a major change in the meaning of an original provision. The majority's insistence on stylistic congruity ignores the reality of the legislative process. Moreover, the panel opinion itself provides the justification for the list of specific kinds of material to be described as "return information," since it holds that items that do not appear in the list are to be treated no differently than any other item requested under FOIA.

The majority's efforts to show that the reading adopted by this court in *Neufeld* v. *IRS*, 646 F.2d 661 (D.C. Cir. 1981), and by the Ninth Circuit in *Long* v. *IRS*, 596 F.2d 362 (9th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980), creates pockets of superfluity is similarly unpersuasive. The tension described is actually created by the majority's insistence that the Haskell Amendment cannot be interpreted as making a few provisions of a large and complex statute internally redundant, although still functionally meaningful and consistent. The futility of relying so heavily on the minor redundancies

the Haskell Amendment effects in neighboring provisions that mention "return information" is demonstrated by the fact that even the majority's reading makes three such provisions superfluous. *See* § 6103(j)(4) ("return information" not to be released "except in a form which cannot be associated with, or otherwise identify . . .); § 6103(i)(7)(A) (same); § 6108(c) (no disclosure shall be such as can be "associated with . . ."). Recognizing the redundancy of these provisions, the majority finds it "remarkable that the dislocations are not greater." Maj. op. at 20. The majority concludes that the superfluity inquiry demonstrates the propriety of its approach because the superfluity it causes is much less than that produced by the interpretation in *Long*. *Id.* Quantitatively, the majority is correct. Its approach wins 5-3. But qualitatively, the superfluity created by both readings of the Haskell Amendment are alike.[7] Neither affects any substantive, practical matter.

Given the unavoidable stylistic superfluity under either construction, I do not see how the redundancy issue can be used to carry the day for either side of the debate. Once it is recognized that any interpretation of the Haskell Amendment "dislocates" some provisions by making them technically unnecessary, I think it useless to award victory to the interpretation that affects the fewer number. The unavoidable conclusion to be drawn from the superfluity created by either construction is that Congress did not concern itself with the fact that some of the other provisions were being made stylistically inelegant. Once that conclusion is reached, minor

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[7] The majority argues that the score is in fact 9-2. Maj. op. at 9 n.2. It supports this by counting § 6103 four separate times, by counting § 6103 twice, by discounting the relevance of § 6108(c), and by arguing that the phrase "in a form" is a flaw to be counted against the circuit's former construction, but not against its own construction. Leaving these accounting issues aside, the fact remains that under either tabulation, neither construction fits snugly with the rest of the statutory scheme.

differences in how many provisions each construction affects become irrelevant.

III.

Aside from its textual arguments, the majority urges that its reading is consistent with plausible legislative intent since any case-by-case assessment that data will not identify a taxpayer is problematic because it "depends to a large extent upon uninformed estimations as to what data the requester [already] possesses." Maj. op. at 10.

The problem of identification by an informed requester is not at all unique to the Internal Revenue. Exemption 4 of the FOIA, for example, exempts from disclosure material containing confidential, commercial information. 5 U.S.C. § 552(b)(4). Exemption 6 exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Exemption 7 deals with law-enforcement investigatory information to the extent that it would "constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 522(b)(7)(c). All of these exemptions clearly implicate the "informed requester" problem, but the Act nonetheless provides that "[a]ny reasonable segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U.S.C. § 552(b). Courts have developed standards and procedures to deal with agency assertions that any disclosure might lead to the substantive harm described by FOIA, taking into account the informed requester issue. *See Dept. of Air Force* v. *Rose*, 425 U.S. 352, 380 (1976) ("what constitutes identifying information regarding a subject cadet must be weighed not only from the viewpoint of the public, but also from the vantage of those who would have been familiar, as fellow cadets or Academy Staff, with other aspects of his career at the Academy"); *Halperin* v. *Central Intelli-*

gence Agency, 629 F.2d 144, 150 (D.C. Cir. 1980) (concluding that CIA was justified in not disclosing information since "[w]e must take into account . . . that each individual piece of intelligence information, much like a piece of jigsaw puzzle, may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself") (quoted approvingly in S. Rep. No. 221, 98th Cong., 1st Sess. 27-28 (1983)); *Schonberger* v. *National Transportation Safety Board*, 508 F. Supp. 941, 945 (D.D.C. 1981) ("the material cannot be redacted in a manner that would protect the identity of the individual whose privacy interest is at stake").

As the panel points out in describing the procedure for evaluating the disclosability of information which does not meet the definition of "return information," courts can, when appropriate, accept affidavits about classes of documents and information, as opposed to requiring document by document searches and Vaughn Indexes. Panel op. at 13-15. Of course, that approach entails some administrative effort, but administrative inconvenience alone has never been considered a sufficient reason for cutting back on FOIA. *See Long*, 596 F.2d at 367 (discussing amounts that some FOIA searches have cost but pointing out that Congress recognized that statute was an expensive one).

The majority argues, however, that while Congress was willing to tolerate the "risk of occasional unknowing disclosure" for FOIA disclosures in general, it was not willing to tolerate that risk for certain classes of information. Maj. op. at 10 (citing Central Intelligence Files). The CIA exemption teaches though, that Congress clearly know how to exclude certain classes of information from FOIA altogether when it wanted to. In the Central Intelligence File context it provided that "[o]perational files of the Central Intelligence Agency may be exempted by the Director of Central Intelligence from the provisions of [FOIA] which require publica-

tion or disclosure, or search or review in connection therewith." 50 U.S.C. § 431.

Indeed, the majority's conclusion that Congress sought to guard broadly against the "informed requester" phenomenon is undercut by the fact that, with regard to IRS written determinations (rulings, determination letters, or technical advice memoranda) and background files relating to written determinations, Congress explicitly provides for public inspection of the documents after *deletion* of the specific exempted data that is not to be disclosed. 26 U.S.C. § 6110. Section 6110 operates independently of FOIA, sets out its own exemptions and procedures, and is in many respects stricter. Yet Congress mandated disclosure after deletion of the nondisclosable material. Written determinations such as private letter rulings that describe the underlying facts of a case surely carry with them the same risk of taxpayer identification, yet Congress was satisfied with deletion.[8] There is, so far as I can tell, nothing to indictate that Congress wanted the informed requester problem treated differently when it comes to return information.[9]

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[8] The majority argues that the error of the *Long* construction is made "particularly clear" when compared with the detailed provisions set out in § 6110 for disclosure of written interpretation documents in which the public has an even stronger interest. The majority's point, however, applies equally to its own analysis of § 6103. Why, under its construction of § 6103 would Congress have permitted disclosure of reformulated, non-identifying information without any of the safeguards of § 6110 (which itself applies to non-identifying, and assumedly reformulated, information)? We all agree that § 6103, unlike § 6110, operates within the confines of FOIA, and does not provide for the extra safeguards listed in § 6110. *See* Panel op. at 4-7. The presence of a separate statutory scheme in § 6110 does not then help the majority at all in showing that Congress was not satisfied with FOIA-type redaction under § 6103.

[9] In the course of the 1981 amendments to the § 6103, Congress evinced an understanding of the scope of the Haskell Amendment, identical to the one adopted in *Long* and *Neufeld*. The Conference Report stated that:

> Present law restricts the disclosure of tax returns and return information. *However, information that cannot identify any particular taxpayer is not protected under the disclosure restrictions.*

H.R. Rep. No. 215, 97th Cong., 1st Sess. 264, *reprinted in* [1981] U.S. Code Cong. & Admin. News 105, 353 (emphasis added). While such subsequent legislative history is, of course, not dispositive, it shows minimally that this reading is not contrary to the intent of Congress.

Given my conclusion that items listed in § 6103(b)(2) that can be disclosed in a manner that does not identify a taxpayer are not "return information," and are therefore not wholly immune from FOIA disclosure [10], I would subject such items to the same procedures as the panel provides for items not specifically listed in § 6103. *See* Panel Op. at 13-15. If the Service determines that disclosure cannot be made without risk of identification, that factual assessment, of course, deserves considerable deference, dependent as it is on the agency's expertise in the area. *See Halperin* v. *Central Intelligence Agency*, 629 F.2d 144, 148 (D.C. Cir. 1980).

The court today overreads an everyday causal phrase of no certain content to impose an important new and comprehensive restriction on disclosure of items listed in § 6103(b)(2), a requirement that does nothing in itself to advance the cause of taxpayer privacy. The majority adopts a "reformulation" test which Congress never intended, and which the majority itself is unable to define. In so doing, the court has misread the thrust of the Haskell Amendment and effectively emasculated its application. The Court has, in the most classic sense, elevated "form" over substance.

I respectfully dissent.

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[10] Even information disclosable under § 6103 is, of course, still subject to possible exemption under one or more of the nine FOIA exemptions. 5 U.S.C. § 552(b).

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1856

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
Appellant,

v.

INTERNAL REVENUE SERVICE, *et al.*

Before: ROBINSON, *Chief Judge,* WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA, STARR and SILBERMAN, *Circuit Judges,* and WRIGHT, *Senior Circuit Judge.*

ORDER

It is ORDERED, by the Court, *sua sponte,* that the Opinion for the Court filed by Circuit Judge Scalia on May 27, 1986, be, and hereby is, amended as follows.

Page 17, line 6, delete "tabulation but a sample return, derived from an actual return but reformulated to substitute new figures for certain items—a partly actual, partly fictional return, so to speak." and insert in lieu thereof "tabulation. At the time the Haskell Amendment was adopted, it appears to have been an actual return with identifying details eliminated. Several years later, perhaps out of recognition that the 1976 legislation no longer permitted such redacted material to be made public, it was altered to consist of a reformulated return, with substitution of new figures for certain items—a partly factual, partly fictional return, so to speak.[3]"

Page 17, line 24, insert new footnote 3:

[3] The three sentences preceding this footnote sign did not appear in our original opinion, as issued in slip form. There the corresponding passage read as follows:

> The latter is not a statistical tabulation but a sample return, derived from an actual return but reformulated to substitute new figures for certain items—a partly actual, partly fictional return, so to speak.

The revision was made to correct a factual inaccuracy brought to our attention by a post-decision motion of amicus American Civil Liberties Union of Washington, which noted that the description of the tax model presented to us by the government in oral argument and reflected in the foregoing passage was accurate for the period beginning about 1980, but was not accurate as of 1976, when the model was an actual return with identifying details eliminated.

The dissent's suggestion, Dissent at 9 n.7, that our decision turned upon this mistaken factual assumption is demonstrably wrong. Our rejection of *Long,* set forth in Part II of this opinion, was made and continues to be made without any reference to this snippet of legislative history. And the only reason for raising it in this Part III of our opinion is to refute the government's position, which relies upon it. The factual inaccuracy in the case as originally presented to us shows the wisdom of relying upon the text and structure of the statute rather than this statement by a single senator as a means of ascertaining the Congress's intent. We have no way of knowing whether Senator Haskell's understanding of the tax model—much less that of his colleagues, if any of them relied upon his remark—comported with our original understanding or rather with what we now know. The mere term "Tax Model" assuredly does not suggest a redacted actual return.

Page 17, lines 22 and 24, renumber footnote 3 as footnote 4.

Page 20, lines 1 and 33, renumber footnote 4 as footnote 5.

It is further ORDERED, by the Court *sua sponte*, that the Dissenting Opinion filed by Circuit Judge Wald on May 27, 1986, be, and hereby is, amended as follows.

Page 9, line 8, insert at end of sentence new footnote 7 to read as follows:

> [7] The fact that Senator Haskell specifically intended to allow disclosure of items such as the tax model strongly supports the *Neufeld* position that redaction is enough to take a document out of the "return information" classification. In reaching its original decision in this case, the majority erroneously assumed that the tax model was a "partly actual, partly fictional return," and thus met its novel "reformulation requirement." Maj. slip op. at 19 (prior to amendment). Through a helpful post-decision motion slip op. at 19 (prior to amendment). Through a helpful post-decision motion filed by the American Civil Liberties Union of Washington, it has now come to light that, at the time of the Haskell Amendment, the tax model was in fact only "an actual return with identifying details eliminated." Maj. op., F.2d at (as amended). *See* Motion of Amicus Curiae to Amend Opinion (filed June 10, 1986). Given this acknowledgement of its mistaken factual assumption, I am amazed that the majority continues to claim that redaction is insufficient under the Haskell Amendment. After having relied in the original opinion on the tax model to refute the government's suggestion that *aggregation* is required, the majority stubbornly refuses now to examine the effect that the newly discovered definition of the then existing tax model has on its own standard of *reformulation*. The correct description of the tax model at the time of passage definitively demonstrates that both the interpretations advanced by the government and the majority are wrong, and that all that the framers of the Amendment thought necessary under § 6103 was effective redaction.

Page 10, lines 17 and 32, change footnote 7 to footnote 8.

Page 13, lines 19 and 24, change footnote 8 to footnote 9.

Page 13, lines 22 and 40, change footnote 9 to footnote 10.

Page 14, lines 4 and 37, change footnote 10 to footnote 11.

Per Curiam
For the Court

GEORGE A. FISHER
Clerk

CERTIFICATE OF SERVICE

I, Robert A. Seefried, a member of the Bar of this Court, hereby certify that on this 23rd day of September, 1986, three copies of the Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid to:

SOLICITOR GENERAL
Department of Justice
Washington, D.C. 20530

and

MICHAEL L. PAUP
Chief, Appellate Section
Tax Division, Department of Justice
Washington, D.C. 20530

Counsel for Respondent herein.

I further certify that all parties required to be served have been served.

Robert A. Seefried
1718 Connecticut Avenue, N.W.
Suite 600
Washington, D.C. 20009
(202) 745-7757
Counsel for Petitioner

OPPOSITION

BRIEF

No. 86-472

In the Supreme Court of the United States

OCTOBER TERM, 1986

CHURCH OF SCIENTOLOGY OF CALIFORNIA, PETITIONER

v.

INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

CHARLES FRIED
Solicitor General
ROGER M. OLSEN
Assistant Attorney General
JONATHAN S. COHEN
MURRAY S. HORWITZ
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

14pp

QUESTION PRESENTED

Section 6103 of the Internal Revenue Code prohibits the IRS from disclosing tax "return information," but defines that term to exclude "data in a form which cannot be associated with or otherwise identify, directly or indirectly, a particular taxpayer." The question presented is whether this definition makes disclosable all material that, either in its original or redacted version, does not disclose the identity of the taxpayer to which it pertains, or whether, as the court of appeals held, the definition makes disclosable only material that has been reformulated into a form (such as a statistical tabulation) that cannot be associated with a particular taxpayer.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-472

CHURCH OF SCIENTOLOGY OF CALIFORNIA, PETITIONER

v.

INTERNAL REVENUE SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals panel (Pet. App. 24a-37a) is reported at 792 F.2d 146. The opinion of the court of appeals en banc, as amended (Pet. App. 38a-93a) is reported at 792 F.2d 153. The order amending the en banc opinion (Pet. App. 90a-93a) is unreported. The opinion of the district court (Pet. App. 1a-14a) is reported at 569 F. Supp. 1165.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 1986. On August 12, 1986, Justice White extended the time within which to file a petition for a writ of certiorari to and including September 23, 1986, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On May 16, 1980, petitioner filed a Freedom of Information Act (FOIA) request with the Internal

Revenue Service (IRS). The request sought various types and categories of information pertaining to certain designated taxpayers, including documents related to a pending Tax Court case.[1] In a response dated July 22, 1980, the IRS requested additional time to locate and consider releasing the records requested by petitioner (C.A. App. 20; Pet. App. 26a). On September 17, 1980, treating the failure of the IRS to respond by that time as a denial, petitioner filed an appeal to the Commissioner. The IRS acknowledged the appeal, but did not immediately respond to it. Pet. App. 1a-2a.[2]

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[1] Specifically, the FOIA request sought "[c]opies of all records, correspondence or any form of information relating to and that might be characterized by the names Scientology, Church of Scientology, Hubbard, Dianetics, L. Ron Hubbard, Mary Sue Hubbard, located in the offices or personal areas of [specified] Internal Revenue officials," as well as "[c]opies of all information relating to or containing the names of Scientology, Church of Scientology, any specific Scientology Church or entity identified by [or] containing the words Scientology, Hubbard and/or Dianetics in their names, L. Ron Hubbard or Mary Sue Hubbard in the form of a written record, correspondence, document, memorandum, form, computor [*sic*] tapes, computor [*sic*] program or microfilm; which is contained in the following systems of records, including but not limited to those located at the National office, Regional offices, Service Centers, District offices or local IRS offices" [four-page list identifying IRS record systems omitted] (C.A. App. 12-13; Pet. App. 2a).

[2] The IRS filed a response to the administrative appeal in January 1981 in which it stated that it had limited its search to records of petitioner itself because the FOIA request did not contain authorization to disclose information pertaining to any of the other taxpayers named therein. The search was limited geographically to the IRS National Office in Washington and to field offices in Los Angeles and in Covington, Kentucky. The response also stated that all the requested documents relating to a pending Tax Court case that had not previously been released were exempt from disclosure under 26 U.S.C. 6103(e)(7) because disclosure would seriously impair federal tax administration. The IRS further explained that it was releasing in full some documents acquired subsequent to the preparation of an index

On December 18, 1980, petitioner brought this suit in the United States District Court for the District of Columbia to compel the IRS to release the requested documents. On June 24, 1983, the district court, after an *in camera* review of the documents, granted summary judgment in favor of the IRS (Pet. App. 1a-14a). The court held: (1) that the IRS had correctly determined that the withheld documents constituted "return information" within the meaning of Section 6103(b)(2) of the Internal Revenue Code,[3] the disclosure of which "would seriously impair federal tax administration" (Pet. App. 6a-8a); (2) that the IRS had correctly limited its search to records of petitioner itself, because none of the other taxpayers named in petitioner's FOIA request had submitted the requisite authorizations for disclosure of their records (*id.* at 10a-12a); and (3) that the IRS was not obliged to search all of its field offices for responsive documents because petitioner filed its request only with the National Office, not with each field office as the Treasury Regulations require (*id.* at 12a-13a).

Petitioner appealed, challenging, inter alia, the district court's conclusion that the withheld documents reflected non-disclosable "return information" of third parties. Section 6103(a) of the Code generally provides that "[r]eturns and return information shall be confidential" and shall not be disclosed by the IRS in any manner. Section 6103(b)(2) exhaustively defines "return information" to include "a

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in connection with the Tax Court case but that it was withholding in part "other National Office documents on [the] grounds that they were outside the scope of the appeal, that their disclosure would cause a clearly unwarranted invasion of privacy, *see* 5 U.S.C. § 552(b)(6), or that they reflected return information of third parties, *see* 26 U.S.C. § 6103(a)." Pet. App. 26a-27a.

[3] Unless otherwise noted, all statutory references are to the Internal Revenue Code (26 U.S.C.), as amended (the Code or I.R.C.).

taxpayer's identity, the nature, source, or amount of his income, * * * whether [his] return was, is being, or will be examined * * *, or any other data * * * prepared by * * * or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability * * * of any person * * * for any tax." Section 6103(b)(2) goes on to provide, however, in what has come to be known as the "Haskell Amendment" (Pet. App. 43a), that "such term [viz., 'return information'] does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer."

In challenging the district court's holding, petitioner relied on the interpretation given to the Haskell Amendment by the courts in *Neufeld* v. *IRS*, 646 F.2d 661 (D.C. Cir. 1981), and *Long* v. *IRS*, 596 F.2d 362 (9th Cir. 1979), cert. denied, 446 U.S. 917 (1980). Those courts interpreted the Haskell Amendment to remove from the defined category of protected information all material that, either in its original or its redacted version, does not disclose the identity of the taxpayer to which it pertains; those courts rejected the government's contention, subsequently accepted by the Seventh Circuit in *King* v. *IRS*, 688 F.2d 488 (1982), that the Haskell Amendment presupposes, besides the fact of nonidentification, some alteration by the IRS of the *form* of the information. After the case had been briefed and argued, the panel entered an order stating that the full court had decided to consider en banc the following question, as to which supplemental briefing was requested (Pet. App. 15a):

> Should the Court adhere to the interpretation of 26 U.S.C. § 6103(b)(2) adopted by the panel opinion in *Neufeld* v. *IRS*, 646 F.2d 661, 665 (D.C. 1981), or should it adopt a different interpretation, in particular that announced by the Seventh Circuit in *King* v. *IRS*, 688 F.2d 488, 490-94 (7th Cir. 1982)?

2. On May 27, 1986, the en banc court issued an opinion addressing the question on which it had directed supplemental briefing, i.e., the meaning of the Haskell Amendment (Pet. App. 38a-89a).[4] On the same day, the panel issued an opinion addressing the other issues presented in the case, applying the holding of the en banc court to the facts of the case, and vacating and remanding the case to the district court for further proceedings (*id.* at 24a-37a). The en banc court held that the Haskell Amendment created a limited exception to the general disclosure bar of Section 6103(a) that does not extend to "*all* nonidentifying data" (Pet. App. 50a (emphasis in original)), thereby explicitly rejecting its prior decision in *Neufeld* v. *IRS* and the holding of the Ninth Circuit in *Long* v. *IRS*. Rather, the court concluded, in order for data to become eligible for disclosure under the Haskell Amendment, the statute "requires—in addition to the fact of nonidentification—some alteration by the government of the form in which the return information was originally recorded" (Pet. App. 56a). The court stated that this "reformulation will typically consist of statistical tabulation or of some other form of combination with other data so as to produce a unitary product that disguises the origin of its components" (*ibid.*). The court noted its disagreement, however, with the government's submission and the Seventh Circuit's statement in *King* that such a reformulation would necessarily be limited to a statistical tabulation (*id.* at 55a-56a, citing *King*, 688 F.2d at 493).

The court explained that both the detailed definition of "return information" set forth in Section 6103(b)(2)(A) and the numerous exclusions set forth in Section 6110 (incorporated by reference in Section 6103(b)(2)(B)) are at odds with petitioner's contention that the mere excision of identifying data suffices to take material out of the

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[4] That opinion was subsequently amended by an order filed July 11, 1986 (Pet. App. 90a-93a).

category of "return information" (Pet. App. 43a-45a). The court also noted that the language of the Haskell Amendment itself cannot be squared with petitioner's interpretation because the text focuses on the *form* in which the material is found (*id.* at 45a). Finally, the court noted that the fact that the Haskell Amendment was adopted at the last minute without discussion other than the comment that it "might not be entirely necessary" (122 Cong. Rec. 24012 (1976)) strongly militated against the notion, implicit in petitioner's argument, that the Amendment wrought a "fundamental change" in the statutory scheme (Pet. App. 49a-50a). The court concluded that an interpretation of the Haskell Amendment that limits its application to material reformulated by the IRS so that it cannot be associated with a particular taxpayer "is the meaning most faithful to the text, most compatible with the remainder of the legislation, and most supportable by a plausible legislative intent" (*id.* at 57a).

Judge Silberman filed an opinion concurring in part. He expressed the view that, because of the deference due the IRS's statutory interpretation, he would agree with the Seventh Circuit's position that the Haskell Amendment exception is limited to "statistical tabulations" (Pet. App. 58a-75a). Three judges dissented from the en banc opinion, agreeing with petitioner that the redaction of identifying information should suffice to bring material within the ambit of the Haskell Amendment (*id.* at 76a-89a).[5]

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[5] The panel opinion resolved a number of other issues, some favorably to petitioner and others favorably to the government. The panel held that the disclosure provisions of Section 6103 do not supersede the FOIA, but rather qualify as a statute restricting disclosure within the ambit of FOIA Exemption 3 (Pet. App. 27a-30a). The panel sustained the IRS's geographical restriction on its search (*id.* at 30a-31a), but held that the district court "erred in accepting the IRS's blanket assertion that all information responsive to [petitioner's] request in files not relating to [petitioner] was exempt from disclosure" (*id.* at 34a). The panel remanded the case for further proceedings in which the IRS would be required, by means of affidavits and (where necessary) indices, to justify its assertion that all third-party information requested by petitioner is not disclosable (*id.* at 31a-37a). Petitioner has not sought review of the panel's judgment insofar as that judgment was unfavorable to it, and we have not filed a cross-petition challenging that judgment insofar as it was unfavorable to the government.

DISCUSSION

Petitioner contends that the en banc court of appeals erred in holding that the exception created by the Haskell Amendment is limited to return information that has been reformulated by the IRS into a form that cannot be associated with a particular taxpayer. Rather, petitioner contends that the Haskell Amendment requires the disclosure of any and all return information once it is redacted to remove identifying data. We believe that the court of appeals correctly rejected petitioner's contention. We do not oppose certiorari, however, because the petition presents a question of substantial importance on which there is a clear conflict in the courts of appeals.

In *Long* v. *IRS*, the Ninth Circuit held that the Haskell Amendment makes disclosable all material that would otherwise constitute "return information," but from which identifying details have been deleted. See 596 F.2d at 367-369. The decision below is inconsistent with the holding of *Long*, and the opinion of the en banc majority explicity rejects that decision (see Pet. App. 43a-50a). This issue has also been litigated in other circuits with disparate results. The Seventh Circuit's decision in *King* v. *IRS* anticipated the decision below in rejecting *Long*, but it holds that "the Haskell Amendment provides only for the disclosure of statistical tabulations which are not associated with or do not identify particular taxpayers"

(688 F.2d at 493). The majority below explicitly rejected that interpretation as unduly narrow (Pet. App. 55a-56a). See also *Currie* v. *IRS*, 704 F.2d 523, 532 (11th Cir. 1983) (following *King*).

We agree with petitioner (Pet. 14) that this conflict concerns an important question of tax administration. The IRS in a typical year receives about 13,000 FOIA requests, and the absence of clear and uniform guidelines for processing these requests creates a substantial burden on the agency. More importantly, the question presented involves the sensitive matter of taxpayer privacy; the expansive reading of the Haskell Amendment adopted by the Ninth Circuit threatens the exposure of information that Congress sought to preserve as confidential (see Pet. App. 46a-47a). Given the divergent views already expressed on this issue in various circuits, it appears unlikely that any uniform guidelines for administering FOIA requests for "return information" can emerge without intervention by this Court. And the persistence of such divergent views among the circuits is a particularly severe problem in FOIA cases because of the various venues in which a requestor can sue to seek to challenge the denial of his request—his place of residence, the situs of the records, or the District of Columbia. Accordingly, we do not oppose the issuance of a writ of certiorari to resolve the conflict in the circuits.[6]

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[6] In our view, it is appropriate for the Court to grant certiorari now even though the case has been remanded to the district court for further consideration as to whether certain documents should be withheld and for the submission by the IRS of more detailed justification for withholding documents. The proceedings on remand, in particular the submission of affidavits and indices by the IRS to justify the failure to disclose documents, are largely directed to the determination whether certain documents constitute "return information" within the meaning of Section 6103 as interpreted by the court of appeals en banc. The remand proceedings would be conducted quite differently if the majority's interpretation of the Haskell Amendment were reversed by this Court. At the same time, there is no likelihood that the proceedings on remand will eliminate the basic dispute between the parties as to the meaning of the Haskell Amendment. Thus, considerations of judicial economy militate in favor of granting certiorari at this point in the litigation rather than waiting until after the proceedings on remand are concluded.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

CHARLES FRIED
Solicitor General
ROGER M. OLSEN
Assistant Attorney General
JONATHAN S. COHEN
MURRAY S. HORWITZ
Attorneys

DECEMBER 1986

U.S. GOVERNMENT PRINTING OFFICE: 1986—181-483/40,62

JOINT

APPENDIX

(3)

No. 86-472

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioner,

v.

INTERNAL REVENUE SERVICE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

MICHAEL LEE HERTZBERG
275 Madison Avenue
New York, New York 10016
(212) 679-1167

ERIC M. LIEBERMAN*
ELLEN J. WINNER
RABINOWITZ, BOUDIN, STANDARD, KRINSKY & LIEBERMAN, P.C.
740 Broadway, 5th Floor
New York, New York 10003
(212) 254-1111

Counsel for Petitioner

*Counsel of Record

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

Counsel for Respondent

PETITION FOR CERTIORARI FILED SEPTEMBER 23, 1986
CERTIORARI GRANTED JANUARY 27, 1987

TABLE OF CONTENTS

The following items appeared in the Appendix to the Petition for Writ of Certiorari and are not re-printed herein. Page references are to the Appendix.

Docket Entries from U.S. District Court

Plaintiffs

CHURCH OF SCIENTOLOGY OF CALIF.

Defendants

1. INTERNAL REVENUE SERVICE
2. ARTHUR LAPPEN

JOHNSON, J.

CAUSE

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

FREEDOM OF INFORMATION ACT
5 U.S.C. 552

Attorneys

George T. Volsky
1333 H St., N.W. 6th Floor
Wash., D.C. 20005
789-8200

John J. McCarthy
U.S. Dept. of Justice
Wash., D.C. 20530
742-6643

DATE	NR.	PROCEEDINGS
1980		
Dec 18	1	COMPLAINT, appearance; Exhibits.
Dec 18	1A	SUMMONS (4) and copies (4) of complt. issued. AG ser 12/22/80 DA ser 12/22/80 #2 ser 1/12/81; #1 ser 1/12/81

Docket Entries from U.S. District Court

DATE	NR.	PROCEEDINGS
1981		
Jan 22	2	ANSWER of defts. to the complaint; Exhibit. CD/N.
Feb 18	3	MOTION of pltff. to require detailed justification, itemization and indexing; memorandum; Attachment A.
Feb 19	4	ATTACHMENT A & B which were omitted from motion filed 2/18/81.
Mar 4	5	MEMORANDUM of deft. in opposition to pltffs motion for Vaughn index.
Apr 15	6	MOTION of defts. for summary judgment; Exhibits 13; memorandum in support of defts. motion for summary judgment; attachments.
Apr 15	7	STATEMENT of undisputed facts upon which deft. relies.
Apr 15	8	MOTION of deft. for leave to submit documents in camera.
Apr 15	9	SUPPLEMENT of pltffs. to motion to require detailed justification itemization and indexing; Attachment A.
Apr 20	10	CHANGE OF ADDRESS for attorney, George T. Volsky, for pltf.
Apr 28	11	MOTION of pltff. for enlargement of time to file statement of points and authorities in opposition to defts. motion for summary judgment; P&A's.

Docket Entries from U.S. District Court

DATE	NR.	PROCEEDINGS
May 14	12	ORDER extending time for pltff. to answer motion of deft. for summary judgment to 5/26/81. (N) JOHNSON, J.
May 26	13	MOTION of pltff. for enlargement of time to file statement of points and authorities in opposition to defts. motion for summary judgment; P&A's.
May 27	14	STATEMENT of points and authorities by pltffs. in opposition to defts. motion for summary judgment; Appendix A.
May 29	15	ORDER filed 5/28/81 granting motion of pltff. for enlargement of time and allowing pltf. until 5/28/81 in which to answer motion of deft. for summary judgment. (N) JOHNSON, J.
Jun 9	16	MEMORANDUM of deft. in reply to pltffs. statement of points and authorities in opposition to defts. motion for summary judgment; attachment.
Jun 25	17	SUPPLEMENTAL statement of points and authorities by pltffs. in opposition to defts. motion for summary judgment; Attachment A.
Jun 21	18	ORDER filed 6/18/82 granting motion of deft. Internal Revenue Service for leave to submit documents in camera; that deft. will have until 7/8/82 to submit documents for inspection. (N) JOHNSON, J.
1982		
Jun 18	19	ORDER denying motion of pltf. for a detailed itemization, etc. (N) JOHNSON, J.

Docket Entries from U.S. District Court

DATE	NR.	PROCEEDINGS
Jul 7	20	MOTION of deft. for reconsideration; affidavit; statement of points and authorities.
Jul 7	21	MOTION of deft. for stay; statement of points and authorities.
Jul 8	22	NOTICE by deft. of lodging of documents in camera.
Jul 19	23	STATEMENT of points and authorities by pltffs. in opposition to defts. motion for reconsideration; attachments.
Aug 3	24	ORDER setting hearing for Aug. 17, 1982 at 9:30 a.m. on the defts. motion for reconsideration and the motion for a stay of a portion of the Courts order of June 18, 1982. (N) JOHNSON, J.
Aug 17		MOTION of deft. for reconsideration, denied. Motion of deft. to stay, denied. (Rep: G. Williams) JOHNSON, J.
Sept 1	25	NOTICE by deft. of lodging of documents in camera.
Sept 7	26	MOTION of deft. for an enlargement of time to comply; affidavit; statement of points.
Sept 10	27	NOTICE by deft. of lodging of documents in camera.
Sept 13	28	ORDER granting extension of time until 9/30/82 for deft. to comply with this courts order of 6/18/82. (N) JOHNSON, J.

Docket Entries from U.S. District Court

DATE	NR.	PROCEEDINGS
Sept 30	29	NOTICE by deft. of lodging of documents in camera.
Oct 1	30	MOTION of deft. for an enlargement of time to comply; P&A's.
Oct 12	31	OPPOSITION of pltff. to defts. motion for enlargement of time.
Oct 12	32	SUPPLEMENTAL memorandum of deft. in support of the motion for summary judgment; attachments.
Nov 12	33	CHANGE of address and telephone number for pltffs. counsel.
1983		
Jun 27	34	MEMORANDUM OPINION filed 6-24-83. (N) JOHNSON, J.
Jun 27	35	ORDER filed 6-24-83 granting motion of deft. for summary judgment; case dismissed with prejudice. (N) JOHNSON, J.
Aug 10	36	NOTICE OF APPEAL by pltf. from order entered 6-27-83; $5.00 USDC fee and $65.00 USCA fees paid and credited to U. S. Treasury; copy of notice sent to: John J. McCarthy, Esq.
Aug 11		COPY of Notice of Appeal and docket entries transmitted to USCA; USCA #83-1856.
Aug 25	37	IN CAMERA SUBMISSIONS filed on 9-1-82, 9-10-82 and 9-30-82 have been sealed and placed in the vault in Room 1800. (2 boxes)

Docket Entries from U.S. Court of Appeals

83-1856 GENERAL DOCKET 83-1856

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPEAL FROM THE DISTRICT COURT

Church of Scientology of California,
Appellant

v.

Internal Revenue Service, et al.

Popular Name:

Number of Case/Order Below: CA80-03239
Case Type: CV.US
JS-34: Yes × No ☐
Judge Below: JOHNSON (9057)
Date of Judg./Order: 06-27-83
USDC Offense/Nature of Suit Code: 2895
Date Docketed: 08-12-83
Date Filed in Dist. Court: 12-18-80
Notice of Appeal Filed: 08-10-83
U.S. Mag: ☐ Direct ☐ Indirect

FINANCIAL

USA	IFP	USDC	RECEIPT
		√	

Counsel: Appellant/Petitioner

Robert A. Seefried 745-7757
1718 Conn. Ave., N.W.
Suite 700 20009

Docket Entries from U.S. Court of Appeals

Counsel: Appellee/Respondent

DOJ:
Glenn L. Archer, Jr. 633-3361
Michael L. Paup
Tax Division
U.S. Dept. of Justice 20530
Richard W. Perkins
Stephen Gray

Joseph E. diGenova, USA
Professor John Neufeld, et al., amicus curiae:

David C. Vladeck 785-3704
Alan B. Morrison
Public Citizen Litigation Group
2000 P St., N.W. Ste. 700 20036

American Civil Liberties Union of
Washington, amicus curiae:

Judith E. Bendich
2111 Smith Tower
Seattle, WA 98104
Stephen K. Strong
Bendich, Stobaugh and Strong

DATE	FILINGS—PROCEEDINGS
(T)08-12-83	Copy of notice of appeal and docket entries from Clerk, District Court (n-2)
(T)08-12-83	Docketing fee was paid in the District Court on 08-10-83
(J)08-26-83	4—Appellant's notice of expedited consideration pursuant to Rule 7(c) (m-25)

Docket Entries from U.S. Court of Appeals

DATE	FILINGS—PROCEEDINGS
(V)08-31-83	Order per Acting CJ Wright that the Clerk is directed to schedule the above case for argument on the merits as soon after the briefs of the parties are filed as the business of the Court permits
(J)08-31-83	4—Appellant's notice of expedited treatment pursuant to Rule 7(c)
(J)09-15-83	1—Letter dated 09-13-83 from counsel for appellant advising that George Volsky has withdrawn as counsel in this matter
(B)09-26-83	CERTIFIED ORIGINAL RECORD (2 vols.) (n-2)
(B)09-26-83	PART OF CERTIFIED ORIGINAL RECORD (containing 2 boxes of In Camera Submissions on 9/1/82, 9/10/82 and 9/30/82) (n-2)—UNDER SEAL IN VAULT
(C)10-04-83	Clerk's order that a briefing schedule is set as follows: Appellant's brief and appendix —11/7/83; Appellees' brief—12/7/83; Appellant's reply brief, if any—12/21/83; Clerk shall include case in March 1984 pool of cases
(B)10-26-83	Order per Acting Chief Judge Wright that the Clerk is directed to calendar this case for argument on the merits as soon after the briefs of the parties have been filed as the business of the Court permits
(J)11-08-83	4—Appellant's motion to defer appendix pursuant to Rule 30(c), FRAP (m-7)
(J)11-08-83	4—Appellant's brief (m-7)

Docket Entries from U.S. Court of Appeals

DATE	FILINGS—PROCEEDINGS
(V)11-16-83	Clerk's order that appellant's motion to proceed under Rule 30(c), FRAP is granted only to the extent that the deferred appendix of the parties may be filed on or before the date appellant's reply brief is due
(J)11-28-83	4—Appellees' motion to extend time to file brief to 12-28-83 (m-23)
(V)12-08-83	Clerk's order that appellee's motion for extension of time in which to file brief is granted on condition that appellee's brief be filed in the Clerk's office by the close of business 12/28/83. Appellant's reply brief, if any, and the appendix of the parties shall be filed on or before 01/11/84. No further enlargement of the briefing schedule herein will be granted absent extraordinary and compelling reasons. The foregoing enlargement of the briefing schedule shall not affect the inclusion of this case in the pool of cases available to be drawn for the March, 1984 calendar
(J)12-29-83	4—Appellees' motion for leave to file brief, time having expired (p-29)
(B)12-30-83	4—Appellant's motion for an extension of time to file reply brief to 02-01-84 (m-29)
(B)12-30-83	Clerk's order granting appellees' motion for leave to file brief, time having expired
(B)12-30-83	15—Appellees' brief (m-29)

Docket Entries from U.S. Court of Appeals

DATE	FILINGS—PROCEEDINGS
(V)01-10-84	Clerk's order that appellant's reply brief, if any, and the appendix of the parties be filed on or before January 26, 1984
(J)01-26-84	15—Appellant's brief (m-26)
(J)01-26-84	15—Appellant's reply brief (m-16)
(J)01-26-84	7—Joint appendix
(J)02-16-84	15—Appellee's brief (m-16)
(J)03-21-84	1—Appellant's notice of withdrawal and substitute of counsel
(V)03-30-84	Clerk's order, sua sponte, that the following times are allotted for oral argument: Appellant—15 minutes; Appellees—15 minutes. Only one counsel per side will be allowed to argue
(V)04-11-84	ARGUED before Wright* and Scalia, CJs and Daniel M. Friedman, CJ for the Federal Circuit
(R)03-18-85	4—Letter from appellant advising of additional authorities pursuant to FRAP 28(j) (m-15) [8]
(T)08-07-85	Per Curiam order, en banc, sua sponte, that this case will be considered en banc on a question relevant to this case (see order for question). This question will be resolved on briefs and without oral argument. The parties are directed to file briefs, not to exceed 20 pages in length, by September 9, 1985. An original and 15

Docket Entries from U.S. Court of Appeals

DATE	FILINGS—PROCEEDINGS
	copies of each brief, with yellow covers shall be hand delivered to the Clerk's Office by 4:00 pm. No briefs in response or in reply will be permitted absent specific request by the Court; Wright, Scalia and Friedman (Federal Cir.) CJs
(J)09-09-85	4—Motion of American Civil Liberties Union of Washington for leave to file brief amicus curiae (m-8) (8)
(J)09-09-85	4—Motion of Professor John Neufeld & Freedom of Information Clearinghouse for leave to file brief amicus curiae (m-9) (8)
(J)09-09-85	30—APPELLEES' SUPPLEMENTAL BRIEF (m-9)
(J)09-09-85	30—APPELLANT'S SUPPLEMENTAL BRIEF (m-9)
(E)09-20-85	Per curiam order, en banc, that the motion of American Civil Liberties Union of Washington for leave to file brief amicus curiae is granted and the Clerk is directed to file the lodged amicus curiae brief of American Civil Liberties Union. The motion of Professor John Neufeld and Freedom of Information Clearinghouse for leave to file brief amici curiae is granted and the Clerk is directed to file the lodged amici curiae brief of Professor John Neufeld and Freedom of Information Clearinghouse. CJ Robinson, Wright, Tamm, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, CJs.

Docket Entries from U.S. Court of Appeals

DATE	FILINGS—PROCEEDINGS
(E)09-20-85	30—Amicus curiae brief of American Civil Liberties Union Foundation of Washington (m-8)
(E)09-20-85	30—Amicus curiae brief of Professor John Neufeld and the Freedom of Information Clearinghouse (m-9)
(T)09-20-85	15—Letter from counsel for appellees advising that they do not object to the motions of Professor John Neufeld and the Freedom of Information Clearinghouse and the ACLU of Washington to file amicus curiae briefs (m-20) [8]
(T)09-20-85	15—Letter from counsel for appellees informing the Court that John F. Murray Acting Assistant Attorney General, Tax Division is participating in this case and not Glenn L. Archer, Jr. (m-20) [8]
(T)09-23-85	15—Appellant's motion for leave to file a supplemental reply brief (m-23) [8]
(E)10-04-85	Per curiam order, en banc, that appellant's motion for leave to file supplemental reply brief is denied and the Clerk is directed to return said supplemental reply brief to appellant. CJ Robinson, Wright, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, CJs.
(E)10-04-85	Supplemental reply brief returned to appellant via first class mail.

Docket Entries from U.S. Court of Appeals

DATE	FILINGS—PROCEEDINGS
(J)10-15-85	Letter from counsel for federal appellees advising of additional authorities pursuant to FRAP 28(j) (m-10) (8)
(E)10-25-85	Per curiam order, en banc, that the Court, en banc, will hear oral argument in this case on December 5, 1985, at 9:30 a.m. Argument will be limited to the following issue: Should the Court adhere to the interpretation of 26 U.S.C. 6103 (b)(2) adopted by the panel opinion in *Neufeld* v. *IRS*, 646 F.2d 661, 665 (D.C.Cir. 1981), or should it adopt a different interpretation, in particular that announced by the Seventh Circuit in *King* v. *IRS*, 688 F.2d 488, 490-94 (7th Cir. 1982)? Each side shall be allocated 20 minutes for its presentation. CJ Robinson, Wright, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, CJs.
(F)12-05-85	ARGUED before CJ Robinson, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia, Starr and Silberman, CJs. At the outset the Court announced that Circuit Judge Wright is a member of this division of the Court but is unable to be present. He will participate in the consideration of the case on the briefs and tape recordings of oral argument. On motion of Ann Durney, Jonathan S. Cohen a member of the Bar of the Supreme Court of Connecticut was allowed to argued pro hac vice for appellee.

Docket Entries from U.S. Court of Appeals

DATE	FILINGS—PROCEEDINGS
(J)03-20-86	4—TRANSCRIPT OF ORAL ARGUMENT—Argued April 11, 1984
(J)03-21-86	4—Letter dated 03-17-86 from counsel for appellant advising of additional authorities pursuant to FRAP 28(j) (m-17) (25)
(J)03-27-86	4—TRANSCRIPT OF ORAL ARGUMENT—Argued December 5, 1985 en banc
(J)04-28-86	4—Letter dated 04-21-86 from counsel for amicus curiae (American Civil Liberties Union Foundation of Washington) advissing of additional authorities pursuant to FRAP 28(j) (m-21) (25)
(C)05-27-86	Opinion for the Court filed by Circuit Judge Scalia.
(C)05-27-86	Judgment by this Court that the judgment of the District Court appealed from in this cause is hereby vacated and this case is remanded all in accordance with the Opinion for the Court filed herein this date.
(C)05-27-86	Mandate order.
(C)05-27-86	Opinion for the En Banc Court filed by Circuit Judge Scalia.
(C)05-27-86	Concurring opinion filed by Circuit Judge Silberman.
(C)05-27-86	Dissenting opinion filed by Circuit Judge Wald, with whom Chief Judge Robinson and Circuit Judge Mikva join.

Docket Entries from U.S. Court of Appeals

DATE	FILINGS—PROCEEDINGS
(C)05-27-86	Per Curiam order, sua sponte, that the Opinion for the Court filed by Circuit Judge Scalia be, and hereby is amended. (SEE ORDER FOR DETAILS).
(C)05-27-86	Per Curiam order, sua sponte, en banc, that the Opinion for the En Banc Court filed by Circuit Judge Scalia is amended as well as the dissenting opinion filed by Circuit Judge Wald. (SEE ORDER FOR DETAILS).
(J)06-09-86	4—Appellant's bill of costs (m-5) (9)
(R)06-10-86	4—Appellant's motion to amend opinion (m-9) [1]
(R)06-20-86	4—Appellant's response to motion to amend opinion (m-20) [1]
(R)06-23-86	4—Appellees' response to previous filings (m-20) [1]
(D)07-11-86	Per Curiam order, sua sponte, that the Opinion for the Court filed by Circuit Judge Scalia on May 27, 1986, be, and hereby is amended. (SEE ORDER FOR DETAILS).
(D)07-18-86	Costs are awarded to Church of Scientology of California in the amount of $967.66 and taxed against the Internal Revenue Service.
(D)08-13-86	MANDATE ISSUED.
(H)08-15-86	5—Copy of letter from Supreme Court extending the time for filing a petition for writ of certiorari to and including September 24, 1986 in SC No. A-90 [1]

Docket Entries from U.S. Court of Appeals

DATE	FILINGS—PROCEEDINGS
	RECEIPT FROM DISTRICT COURT FOR SEALED RECORD 8/13/86
	RECEIPT FROM DISTRICT COURT FOR RECORD DATED 7-24-86
(R)10-02-86	Notice from Clerk, DC advising that petition for certiorari was filed in SC no. 86-472 on 09-23-86 [1]
(A)01-30-87	2—Petition for certiorari granted on January 27, 1987 [1]
(J)02-02-87	Certified copy of order from Clerk, Supreme Court granting that petition for writ of certiorari on January 27, 1987.
(J)03-03-87	Clerk's order that the Clerk of the District Court transmit to this Court the record on appeal previously transmitted and subsequently returned
(J)03-03-87	CERTIFIED ORIGINAL RECORD—2 volumes
(J)03-03-87	CERTIFIED ORIGINAL RECORD—2 boxes under seal (in camera submissions)
(J)03-04-87	Letter dated 03-04-87 from Chief Deputy Clerk to Clerk, Supreme Court transmitting record
(J)03-04-87	Receipt from Clerk, Supreme Court acknowledging receipt for record

FOIA Request dated May 16, 1980

UNITED STATES
CHURCH OF SCIENTOLOGY OF CALIFORNIA
5930 Franklin Ave.,
Los Angeles, California 90028

Chief Disclosure Staff
INTERNAL REVENUE SERVICE 16 May 1980
1111 Constitution Ave.
Washington, D.C.

HAND DELIVERED

RE: FREEDOM OF INFORMATION REQUEST

Dear Sir:

This letter is on behalf of the Church of Scientology of California. Enclosed is an authorization for me to represent the Church in this matter executed by the President of the Board of Directors.

Pursuant to the Freedom of Information Act, 5 U.S.C. 552, as amended, we wish to obtain access to and copies of information, documents, correspondence, microfilm, computor tapes and programs, and other items as herebelow described.

The Church is prepared to pay reasonable costs for the locating of this information and for the reproduction of same. Our understanding of IRS procedure in this regard is that payment in advance is not required unless there is evidence of bad credit on the part of the requesting person or entity. This organization's record of payment of costs related to FOIA requests to the IRS in the past should be adequate to allow the Service to proceed with this request without delay. We do ask that we be informed

as the earliest possible date, the expected expense for full compliance with our request.

In the ongoing litigation of *Church of Scientology of California* v. *Commissioner of Internal Revenue*, Docket No. 3352-78, this Church filed, circa January 1979, Petitioner's First Request for Production of Documents. A copy is enclosed for your reference. At a hearing of this case in May of 1979, Paul Wilson, Assistant District Counsel Los Angeles, agreed to provide to the Church, an index of all information responsive to the Church's Request, with these exceptions:

1. Documents and records asked for in paragraph "A" of the Request for Production, as these had been previously indexed but not released in the FOI case, *Church of Scientology of California* v. *Internal Revenue Service et al.*, Civil No. CV 74-3465-RJK;

2. Documents and records already released to the Church in the above FOI case.

At this time, pursuant to the FOIA, we request access to and copies of all information which was asked for in Petitioner's Request for Production of Documents, referenced above and enclosed; with the exception of the documents and information already released to the Church in the former FOI case above.

Specifically, we request access to and copies of all information indexed in the Tax Court case referenced above, and all documents, records and deleted portions of documents and records, indexed but not released in the FOI case referenced above. As all of these materials have already been located and indexed, both the costs and time

involved in this undertaking should be substantially reduced.

A copy of the index produced in the Tax Court case should be obtainable from either Paul Wilson of Los Angeles Districts Counsel's Office or Charles Rumph of Chief Counsel's Office.

Additionally, any documents or records located that are responsive to the Request for Production, which are not included on the index above and which are not specifically excepted herein, are also requested.

We further request copies of and access to all information in any form which is responsive to said Request for Production which has been generated or received, or has otherwise come into the possession of the Internal Revenue Service subsequent to the last indexing done and up to the present time. Note, that the index provided in the Tax Court case above, was provided piecemeal and this request includes all addendums and other additions thereto.

Although covered generally in the requests above, we also request with more specificity the following:

A. Copies of all records, correspondence or any form of information relating to and that might be characterized by the names Scientology, Church of Scientology, Hubbard Dianetics, I. Ron Hubbard, Mary Sue Hubbard, located in the offices or personal areas of the following Internal Revenue Service officials:

Commissioner
Deputy Commissioner
Assistant Commissioner—Compliance
Technical
EP/EO
Inspection

FOIA Request dated May 16, 1980

Director Audit Division
Director Criminal Investigation Division
Director Office of International Operations

B. Copies of the file labels or tabs identifying any and all files containing information requested herein.

C. Copies of all documents or other information, including but not limited to, information stored or maintained in computor systems or on microfilm, relating to any program or activity carried on at the Covington, Kentucky Internal Revenue Service which involved the instruction of IRS personnel in selecting for audit or examination the returns of Scientologists or relating to Scientology, and/or instruction in the treatment of such audits or examinations.

D. Copies of all information relating to or containing the names of, Scientology, Church of Scientology, any specific Scientology church or entity identified by containing the words Scientology, Hubbard and/or Dianetics in their names, L. Ron Hubbard or Mary Sue Hubbard in the form of written record, correspondence, document, memorandum, form, computor tape, computor program or microfilm; which is contained in any of the following systems of records, including but not limited to those located at the National Office, Regional Offices, Service Centers, District Offices or local IRS offices:

System Number		System Name
Treas/IRS	10.004	Subject Files, Public Affairs
	22.005	Audit Underreporter Case File TX:R
	22.012	Collection Case File, TX:R

FOIA Request dated May 16, 1980

System Number		System Name
	22.026	FORM 1042S Index By name of Recipient
	22.032	Individual Microfilm Retention Register
	22.027	Forms Filed by US Citizens or Residents Relating to Foreign Companies
	22.034	Individual Return Files, Adjustments Miscellaneous Documents Files, T
	22.043	Potential Refund Litigation Case Files TX:R
	22.054	Subsidiary Accounting Files, TX:R
Treas/IRS	22.061	Information Returns Processing (IRP) File TX:R
	24.013	Combined Account Number File, Data Services
	24.014	Discriminate Function File (DIF), Data Services
	24.017	Employee Inquiry Look-Up for TDA Inquiries, Data Services
	24.029	Individual Account Number File (IANF) Data Services
	24.030	Individual Master File (IMF) Data Services
	24.057	Taxpayer Delinquent Investigation Notice File, Data Services
	26.003	File of Persons Making Threats of Force or Forcible Assaults CP:C

FOIA Request dated May 16, 1980

System Number	System Name
26.007	Form 2990—Miscellaneous Investigations
26.009	Lien Files (Open and Closed) CP:C
26.011	Litigation Case Files, CP:C
26.012	Offer in Compromise (OIC) File, CP:C
26.013	One Hundred Percent Penalty Cases, CP
26.016	CP:C—Treas/IRS—Returns Compliance Programs (RCP)
26.019	TDA (Taxpayer Delinquent Accounts) including subsystems: a) Adjustment and Payment Tracers Files, b) Collateral Files, c) Seized Property Records, and d) Tax Collection Waiver Forms 900 Files, CP:C
26.020	TDI (Taxpayer Delinquent Investigation Files, CP:C
26.021	Transferee Files, CP:C
26.022	Delinquent Prevention Programs, CP:C
34.017	Audit Trail File
42.001	Examination Administration File
42.008	Audit Information Management System (A)
42.021	Compliance Programs and Projects Files

FOIA Request dated May 16, 1980

System Number	System Name
42.024	Coordinated Examinations of Large Case Program
42.017	Internation Enforcement Program Files
42.018	Married Taxpayers Filing Separately a Multiple Filer File
Treas/IRS 42.015	Open and Closed Narcotics Trafficker Files
42.013	Project Files for the Application of Laws as a Result of Technical Determinations and Court Decision
42.023	Request and Submittal File for Technical Advice, Assistance, Determination or Coordination
42.009	Strike Force
42.012	Tax Shelter Program Files
44.003	Appellate Division Case Data
44.001	Appellate Case Files
46.002	Case Management and Time Reporting Criminal Investigation Division
46.003	Confidential Informants, Criminal Investigation Division
46.004	Controlled Accounts—Open and Closed Criminal Investigation Division
46.005	Electronic Surveillance File, Criminal Investigation Division

FOIA Request dated May 16, 1980

System Number	System Name
46.008	Treas/IRS Criminal Investigation Div Information and Correspondence Criminal Investigation Division
46.007	Information Indexing System, Criminal Investigation Division
46.009	Information Items, Criminal Investigation Division
46.013	Project Files, Criminal Investigation Division
46.022	Treasury Enforcement Communications System (TECS), Criminal Investigation Division
48.001	Disclosure Records, Disclosure
48.008	Defunct Special Service Staff File retained because of Congressional directive, ACTS:C
49.001	Collateral and Information Requests System
49.003	Financial Statements File
49.007	Overseas Compliance Projects System
49.008	Taxpayer Service Correspondence System
50.002	Employee Plans/Exempt Organizations EP Determination Letter Records

FOIA Request dated May 16, 1980

System Number	System Name
Treas/IRS 50.001	Employee Plans/Exempt Organizations Employee Plans/Exempt Organization Assignment Record (Form M-6209)
Treas/IRS 50.003	Employee Plans/Exempt Organization Reports of Significant Matters in EP/EO (M-5945)
Treas/IRS 60.001	Assault and Threat Investigation File Inspection
Treas/IRS 60.007	Miscellaneous Information File, Inspection
Treas/IRS 60.009	Special Inquiry (Complaint) Investigation Files, Inspection
Treas/IRS 80.003	Correspondence Control and Records, Assistant Commissioner (Technical)
Treas/IRS 80.004	Reference Index Digest Cards, Assistant Commissioner (Technical)
Treas/IRS 80.005	Reports of Significant Matters (Form M-5945) Assistant Commissioner (Technical)
Treas/IRS 90.001	Chief Counsel Criminal Tax Case Files Each Regional Counsel, District Counsel and National Office maintain one of these systems. This applies to all 46 systems
Treas/IRS 90.002	Chief Counsel Disclosure Litigation Division Case Files

FOIA Request dated May 16, 1980

System Number	System Name
Treas/IRS 90.005	Chief Counsel General Litigation Case Files. Each Regional Counsel, District Counsel and the National Office maintain one of these systems. This applies to all 46 systems.
Treas/IRS 90.006	Chief Counsel Interpretative Division Case Files
Treas/IRS 90.007	Chief Counsel Legislation and Regulation Division Correspondence and Private Files
Treas/IRS 90.009	Chief Counsel Tax Litigation Case Files. Each Regional, District Counsel and the National Office maintain one of these systems. This applies to all 46 systems
Treas/IRS 90.010	Digest Room Files Containing Briefs and Digests of Documents Generated Internally or by the Department of Justice Relating to the Administration of the Revenue
Treas/IRS 90.012	Internal Control Records for Chief Counsel Legal Files
Treas/IRS 90.013	Legal Case Files for the Chief Counsel Deputy Chief Counsel, (General, Litigation and Technical) and the staffs
90.015	Reference Records of the Library in the Office of Chief Counsel

FOIA Request dated May 16, 1980

System Number	System Name
90.016	Reports and Information Retrieval Activity Computer and Microfilm Records
00.002	Correspondence Files and Correspondence Control Files (Including inquiries about enforcement activities)

Although the requests made above cover documents and information stored or maintained in a variety of areas at different echelons of the Service, this request is being directed to the National Office so proper coordination and handling can occur.

Admittedly, it is not feasible for the Service to comply fully with a request of this magnitude in the 10 working days allowed in the statute; but we would ask that you respond within that time and comply with copies of the documents at the National Office level which were previously indexed; and that you provide us with an estimate of costs and a schedule of when compliance can be expected for the rest of the requests, giving specific dates.

Sincerely yours,

/s/ James Morrow
Reverend James Morrow
Ministry of Legal Affairs

FOIA Administrative Appeal dated September 17, 1980

MINISTRY OF LEGAL AFFAIRS
UNITED STATES

CHURCH OF SCIENTOLOGY OF CALIFORNIA
1306 N. Berendo Street
Los Angeles, California 90027

17 September 1980

Freedom of Information Appeal
Commissioner of Internal Revenue
Ben Franklin Station
Post Office Box 929
Washington, D.C. 20044

Dear Mr. Commissioner:

This letter constitutes an appeal under the Freedom of Information Act, 5 U.S.C. 552, of a request made pursuant to such act on 16 May 1980 by the Church of Scientology of California (Church). The undersigned authored the original request by authorization of the President of the Board of Directors of the Church. A copy of the original request and accompanying authorization are enclosed for your reference and as a description of the requested documents and records.

This FOI request was hand-delivered to the National Office of the Internal Revenue Service and acknowledged by a receipt dated May 21, 1980. A copy of such receipt is also enclosed.

The statute mandates that a Federal agency respond to an FOI request within 10 days of receipt, not including weekends and holidays. Because this particular request was quite voluminous the request itself allowed that full

compliance was not expected in the usual 10 days. It *was* expected, however, that at least some compliance would come, and *at the very least,* we would receive a request for more time with a specified date of response. This is no more than the statute requires. When no response at all was received a letter was sent pointing out this fact on 16 June 1980. A copy is enclosed. Again it was asked that the government at least comply with part of the request and send some communication projecting a schedule when full compliance could be expected.

Finally, some 2 months after the original request was made, and after phone conversations with Lewis Kirschner of the National Office Freedom of Information Branch, a letter was received signed by the Chief of Section II, Freedom of Information Branch asking for more time and advising that an appeal could be filed if we did not agree to such an extension. An "Estimated Date of Response" was given as 29 August 1980. (A copy of this letter is enclosed.)

Relying on the Services' good faith, and with the hope that this request would be handled without resort to litigation, the extension was granted by letter of 4 August 1980; but with a clear statement that a response was expected no later than 29 August 1980. (A copy of this letter is also enclosed.)

This "Estimated Date of Response", came and went with no communication at all forthcoming from the Service. Lewis Kirschner was called on 2 September 1980 to find out what had happened. We were informed that our request had been forwarded to Chief Counsel's Office and that he, Mr. Kirschner, was waiting for Counsel to decide what to do. Mr. Kirschner offered to call up Counsel's Office and obtain some concrete estimation of the status of the request. His response as a result of this was that

someone in Chief Counsel's Office had a 2,000 page index and a room full of documents but that there was not yet any decision as to whether any of them would be released. Mr. Krischner tried for the next two weeks to get an affirmative response from Chief Counsel's Office but finally called on 16 September, 1980 to apologize and explain that it was out of his hands with Counsel and that he could not get them to even estimate when they *might* respond.

It is now 4 months since the date of this FOI request and the only written communication from the Service is one letter asking for more time.

This request was made as a result of the statement of Assistant District Counsel for the Los Angeles District, Paul Wilson, that the Service has amassed an incredible 102 linear feet of files related to the Church of Scientology. As a result of such file accumulations by the government in the past, and the share of false and defamatory information which always tends to be part of them, the Church has suffered unwarranted arbitrary and often harassive treatment. It is our belief that this kind of treatment and the animus which the Service manifests toward the Church of Scientology, will not abate until such false and defamatory records are exposed and corrected. These delays in responding to our request appear to be only a further manifestation of the "it's not important", irresponsible attitude of the Service which has resulted in such a store of records being amassed in the first place. It appears that it will again require litigation to make the government machinery respond. Hopefully, through a response to this appeal that won't be necessary.

This letter and its enclosures provides all of the requisites of a proper appeal, a description of the requested

records, the date of the request and the date of its denial. Since such denial was constructive, based upon the expiration of the required period for response, no reasons for denial have been given which can be addressed herein. The final requisite, my name and address are:

Reverend James Morrow
Church of Scientology of California
5930 Franklin Avenue
Hollywood, California 90028

Sincerely yours,

/s/ James Morrow
Reverend James Morrow

Enclosures: 16 May 1980 FOI request and related correspondence.

JM/sc

IRS Administrative Memorandum for Reviewers dated January 13, 1981

Routing and Transmittal Slip
All Reviewers

In re: FOIA Appeal of James Morrow on Behalf of the Church of Scientology of California
CC:D:Br 3-394-80

REMARKS

Enclosed is our proposed response to the FOIA appeal of James Morrow on behalf of the California Church of Scientology. We recommend release of certain documents.

The California Church filed suit on December 18, 1980, and the Service's answer is due on January 21, 1981. Therefore we request expeditious review of this appeal.

The indices referred to in the memorandum for reviewers are available in our office should you wish to see them.

Please call Kathy Whatley (566-3321) for pick-up of this package as soon as you have completed your review.

Do not use this form as a Record of approvals, concurrences, deposals, clearances and similar actions

From:	Room No.—Bldg.
Arthur L. Lappen	3552
Chief, Branch 3	Phone No.
Disclosure Litigation Div.	566-3321

IRS Administrative Memorandum for Reviewers dated January 13, 1981

Memorandum for Reviewers

In re: FOIA Appeal of James Morrow on Behalf of the Church of Scientology of California

I. *History of Appeal.* By letter dated May 16, 1980, James Morrow made an FOIA request for certain documents relating to the Church of Scientology of California (hereinafter referred to as the California Church) and certain other entities and individuals. The scope of this request is discussed in Part II of this memorandum. Mr. Morrow's letter was received by the Disclosure Operations Division on May 21, 1980. Mr. Morrow sent a follow-up letter dated June 16, 1980 asking to be notified of a schedule of compliance with his request and requesting immediate partial compliance. On July 22, 1980, a form FOIA extension letter was sent to Mr. Morrow indicating an estimated response date of August 29, 1980.

On July 30, 1980, Disclosure Operations requested that this Division consider the request, and on August 9, 1980 we sent search requests to 11 Counsel functions. By letter dated August 4, 1980, Mr. Morrow responded to the July 22nd Disclosure Operations letter stating that he would expect a more substantive response by August 29th.

By letter dated September 17, 1980, Mr. Morrow filed this appeal on the basis of the Service's failure to respond to his request. This appeal was acknowledged by letter dated October 3, 1980, and the statutory response date was determined to be October 21, 1980. Mr. Morrow acknowledged the acknowledgement letter dated October 13, 1980. By letter dated November 14, 1980 Richard P. Harris sent an

FOIA complaint marked draft and informed us that, unless we responded to Mr. Morrow's appeal within 10 days, he would file the complaint.

II. *Scope of Appeal.* Mr. Morrow's request refers to a Request for Production of documents filed by the California Church in *Church of Scientology of California* v. *Commissioner*, Docket No. 3352-78 (U.S.T.C.) [hereinafter referred to as the Tax Court case] and an agreement by Paul Wilson, Assistant District Counsel (Los Angeles) to provide an index for the documents so requested with the exception of those documents indexed but not released and those documents released by *Church of Scientology of California* v. *IRS* et al., Civil No. 74-3363-RJK (C.D. Cal. October 29, 1976) [hereinafter referred to as the FOIA lawsuit or FOIA I]. Mr. Morrow requested; (1) all documents indexed in the Tax Court case; (2) all documents indexed but not released in the FOIA lawsuit; (3) all documents responsive to the Tax Court Request for Production not indexed; (4) all documents generated or received by the Service subsequent to the last indexing; (5) all documents relating to Scientology, Church of Scientology, Hubbard, Dianetics, L. Ron Hubbard, or Mary Sue Hubbard located in 9 specified offices; (6) copies of all file labels or tabs; (7) copies of all documents relating to activities of the Covington, Kentucky office regarding instruction of Service personnel in selecting Scientology related returns for examination; and (8) all documents relating to Scientology, Church of Scientology, Hubbard, Dianetics, L. Ron Hubbard, or Mary Sue Hubbard contained in the majority of the Service's systems of records nationwide (with the primary exception of those systems which are personnel related). Attached to

Mr. Morrow's request was an authorization from Kenneth J. Whitman, President, Board of Directors, Church of Scientology of California, authorizing James Morrow to represent the California Church with regard to the May 16, 1980 FOIA request.

In processing this request in terms of the entities or individuals involved, we have limited its scope to documents pertaining to the California Church. Mr. Morrow's authorization is only from the California Church; he has not presented authorizations from any other Scientology entity or the Hubbards.

In terms of the offices searched, we caused a search to be conducted in the 10 offices specified by Mr. Morrow, namely the offices of the Commissioner, Deputy Commissioner, Assistant Commissioner (Compliance), Assistant Commissioner (Technical), Assistant Commissioner (Employee Plans/Exempt Organizations), Assistant Commissioner (Inspection), Audit Division (now Examinations), Criminal Investigation Division, and Office of International Operations, and the Covington, Kentucky office (the Cincinnati Service Center is located in Covington). These searches were not conducted in the field counterparts of any of the above enumerated functions. We also caused a search to be conducted in the 3 Commissioner offices and 12 Counsel offices referred to in the Privacy Act systems of records listing. These searches were to be conducted in terms of the FOIA request subject to the above-enumerated restrictions and not in terms of specific systems of records since the California Church is not an individual and cannot use the Privacy Act. These 15 offices are: Returns Processing and Accounting Division, Collection Division, Appeals Divi-

sion, Chief Counsel, Deputy Chief Counsel (Administrative), Deputy Chief Counsel (Technical), Deputy Chief Counsel (Litigation), Administrative Services, Criminal Tax Division, Disclosure Litigation Division, Employee Plans and Exempt Organizations Division, General Litigation Division, Interpretative Division, Legislation and Regulations Division, and Tax Litigation Division. No field counterpart offices were searched because the request was made to the National Office, not to the respective field offices. The District Counsel, Los Angeles, however, was searched because of the Tax Court case. The Disclosure Litigation Division file relating to *Church of Scientology of California* v. *IRS*, Civil No. CV 74-3465-RJK (C.D. Cal.) is missing. This file is a litigation file relating to the FOIA I lawsuit. Although we have searched all relevant offices, we have been unable to locate this file. A list of offices searched and the results is included as background.

In terms of the documents at issue, we consider them to comprise 4 categories: (1) those documents denied in the FOIA lawsuit, (2) those documents indexed in connection with the Tax Court case, (3) any documents generated subsequent to the Tax Court index and relating to the Tax Court case, and (4) any documents generated subsequent to the Tax Court index located in the National Office and relating to the California Church. We have considered any documents relating to any Scientology entity other than the California Church, any individual, or any litigation in which the California Church has been or is involved other than the FOIA lawsuit and the Tax Court case (i.e., the summons enforcement case involving the California Church and the ongoing lawsuit by the Founding Church in which the California Church is a conditional class member, *Founding Church of Scientology et al.* v. *FBI*, Civ. No. 78-0107 (D.D.C.)) to be outside the scope of this appeal.

III. *FOIA I Documents.* The request which is the subject of this appeal specifically includes those documents which were denied in the FOIA lawsuit. On November 26, 1974, the California Church filed its complaint in *Church of Scientology of California* v. *IRS et al.*, Civil No. CV 74-3465-RJK (C.D. Cal.) seeking access to all records pertaining to "the activities, operation, or conduct of the Church of Scientology of California." A large-scale search by the Service located over 6,000 documents consisting of approximately 32,000 pages. These documents were indexed in a 1,600 page index, and the index was provided to the California Church on March 17, 1975. As a result of various requests, releases, and motions, the scope of the documents at issue was narrowed. On July 19, 1976, the Court ordered the Service to designate the particular exemptions which were being asserted for the documents still at issue. On July 20, 1976, the Service filed Appendix A, a 312 page Vaughn index of the 290 documents remaining at issue, the exemptions being asserted, and discussions of how each exemption applied to the specified document. (See the brief in support of the motion for summary judgment, pp. 2-4). The Service filed its motion for summary judgment on August 30, 1976.

On October 29, 1976, the court entered an order granting summary judgment in favor of the Service. In the findings of fact and conclusions of law, the court sustained each of the exemptions asserted by the Service. Copies of

the order and the findings of fact and conclusions of law are included as background.

On December 28, 1976, the California Church filed a notice of appeal with the Ninth Circuit Court of Appeals. The California Church requested several extensions of time in which to file its brief. Approximately two months after the final extension lapsed, the Department of Justice filed on September 7, 1978 a motion to dismiss the appeal for failure to prosecute. The Court of Appeals granted this motion on October 23, 1978. Subsequently a brief on behalf of the California Church was filed by Tobias Tolzman which was rejected because Mr. Tolzman was not the attorney of record. A motion for reconsideration was denied by the Court of Appeals.

The doctrine of res judicata provides that a final judgment when rendered on the merits operates as an absolute bar to subsequent litigation between the same parties or those in privity with them upon the same cause of action. See *Montana* v. *United States*, —— U.S. ——, 99 S. Ct. 970, 973 (1979); *Hawlor* v. *National Screen Service Corp.*, 349 U.S. 322, 326 (1955); *Moore*, Federal Practice ¶ 0.405 [L] at 621-624 (2d ed. 1974). Res judicata binds the parties as to all grounds or defenses, whether or not raised, which were available to the parties regarding the cause of action and serves to promote conclusive resolution of legal disputes and conservation of judicial resources. *See Montana, supra,* at 974; *Moore, supra* at 623-4; *Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1948).

The California Church, acting through Mr. Morrow, seeks access to those documents which were denied to it in *Church of Scientology of California* v. *IRS et al.*, Civil

No. CV-74-3465-RJK (C.D. Cal. October 29, 1976). Since that court reached a decision on the merits based on its findings of fact and conclusions of law, the doctrine of res judicata is applicable to this subsequent attempt to obtain access to these documents pursuant to the FOIA. As a general rule, the conclusive effect of a judgment as res judicata is not altered by a subsequent change in circumstances. *See Moore supra,* ¶ 0.415 at 2051.

However, there is an exception to this rule when there has been a material change of circumstances. Id. at 2053. Since subsection (b)(7)(A) was asserted for certain of the documents at issue on the grounds of interference with an enforcement proceeding and since several years have passed, we reviewed these documents in order to segregate any documents for which subsection (b)(7)(A) was asserted as either the sole or a primary defense. Twenty of the 290 documents fell into this category, and we requested that these 20 documents be reviewed by the Tax Litigation Division.

Charles Rumph of the Tax Litigation Division informed us that 5 documents could be released in full or in part. Documents 2563 and 4060-66 could be released in full. Documents 6369-C, 3901, and 3907 could be released in part after deletion of identities of or information concerning third party sources. Therefore, a single deletion on the second page of document 6369-C is based on subsections (b)(7)(C) and (b)(7)(D). The first sentence of the fourth paragraph of document 3901 is exempt pursuant to subsection (b)(7)(D), and the first paragraph of document 3907 is exempt pursuant to subsection (b)(7)(C). Mr. Rumph stated that there would be no problem with

releasing document 5151 provided that the San Diego Police Department had no objections. The question of releasing document 5151 was discussed on December 8, 1980 with John Kaheny, legal counsel for the San Diego Police Department, who stated that there would be no objection to our release in conjunction with this FOIA request. Therefore, document 5151 may be disclosed.

With regard to the other 14 documents, Mr. Rumph stated that they should continue to be withheld pursuant to the other exemptions asserted during the lawsuit. These 14 documents and their exemptions are as follows:

35	(b)(5)
37	(b)(5)
236	(b)(5)
2600	(b)(5)/(b)(6)/(b)(7)(C)/(b)(7)(D)
2626	(b)(5)
2680	(b)(5)/(b)(6)/(b)(7)(C)/(b)(7)(D)
3092	(b)(5)
3257	(b)(5)/(b)(7)(D)
3930-24	(b)(6)/(b)(7)(C)
3930-O	(b)(6)/(b)(7)(C)
3930-Q	(b)(6)/(b)(7)(C)
5979	(b)(5)
5980	(b)(5)
6395-A	(b)(5)/(b)(6)/(b)(7)(C)/(b)(7)(D)

As for the 270 documents which were withheld primarily due to exemptions other than Subsection (b)(7)(A), the Service asserts the final judgment of *Church of Scientology of California* v. *IRS et al.*, Civil No. CV 74-3465-RJK (C.D.

Cal. October 29, 1976) as a bar to this appeal pursuant to the doctrine of res judicata. Since the doctrine of res judicata precludes the raising of any defenses not previously asserted absent a material change in circumstances, we are not asserting any new exemptions for these 284 documents.

IV. *Documents Contained in the Tax Court Index.* During the discovery stage of the Tax Court case, the California Church filed a motion for production of documents. After three way negotiations between counsel for both parties and the Tax Court judge, it was agreed that the Service would index the documents subject to this motion but would not index those documents previously released in FOIA I or indexed but not released in FOIA I. The Service conducted a massive search of National and field offices and the results were compiled as a three volume index which was provided to the California Church. The California Church indicated that it wished to inspect certain documents comprising roughly 20% of the total. Counsel for the Service made available to the California Church approximately 50% of the indicated documents and asserted various privileges and defenses for the remainder. Ruling on various motions by the parties, the Tax Court ordered the additional release of a few documents and sustained the withholding of the rest. The case is now in the process of trial, and it is anticipated that the trial will be completed during March 1981.

On behalf of the California Church, Mr. Morrow has requested access to all documents which are indexed in the three volume Tax Court index. It is important to note that the index itself and the entire process of discovery

of these documents are the result of complex negotiations by counsel for both sides and the Tax Court judge. As the result of these negotiations, various motions and countermotions, and rulings by the Tax Court, certain of these documents have been released to the California Church. The remainder of these documents are exempt pursuant to I.R.C. § 6103(e)(7).

Section 6103(e)(7) provides that return information of a taxpayer may be disclosed to the taxpayer or person with a material interest (as defined in section 6103(e)(1) through (e)(6)) unless disclosure would seriously impair federal tax administration. It has been held that, where return information is at issue, section 6103 is the sole standard governing disclosure. *See*, e.g., *Zale Corp.* v. *IRS*, 481 F. Supp. 486 (D.D.C. 1979). Accordingly, the question is whether disclosure would seriously impair federal tax administration.

It is the Service's position that disclosure would seriously impair federal tax administration by interfering with the on-going Tax Court litigation. The discovery procedures which were negotiated in the Tax Court case by counsel for both sides and the judge were very complex and unique and patterned to suit the needs of both the California Church and the Service. To permit the California Church through Mr. Morrow to obtain access to these documents at this time by means of the FOIA would negate the procedures worked out in the Tax Court litigation that were accepted by the California Church and would allow the California Church to circumvent the Tax Court discovery rules. By disregarding the specific Tax Court discovery procedures established in this case, dis-

closure would interfere directly with the ongoing Tax Court litigation. In addition, disclosure would in certain instances reveal governmental strategy and attorney work product. It is, therefore, our position that disclosure of these documents which have not previously been released would seriously impair federal tax administration.

V. *Documents Generated Subsequent to the Tax Court Index and Relating to the Tax Court Litigation.* Mr. Morrow's request includes documents which have been generated subsequent to the time period covered by the Tax Court index. As stated earlier, we construe this to be documents which are related to the Tax Court litigation. We have checked only with the Tax Litigation Division and District Counsel (Los Angeles). Conversations with Charles Rumph and Paul Wilson indicate that these documents comprise approximately between three and four file drawers. We understand that there may be some documents with the revenue agent which are not duplicated in the District Counsel office. No attempt has been made to index these documents at this time.

These documents are exempt from disclosure pursuant to section 6103(e)(7). These documents are involved with the Tax Court litigation, and disclosure would interfere with that case by revealing governmental strategy and attorney work product and by reallocating personnel from preparing for and conducting the ongoing trial to reviewing these documents. It is our opinion that disclosure at this time would seriously impair federal tax administration.

IRS Administrative Memorandum for Reviewers dated January 13, 1981

VI. *National Office Documents Subsequent to Tax Court Index.* We have reviewed these documents and have determined that documents A-2, A-3, A-4, A-5, A-8, A-16, A-17, and A-19 may be released in full. Portions of A-7, A-11, and A-20 are outside the scope of this appeal but the remainder of these documents may be released.

Documents A-1, A-6, A-10, A-12, A-13, A-14, A-15, and A-18 are being released in part. References to Service personnel assigned to various cases, including in one instance a case assignment sheet which lists all attorneys in a particular Division, have been deleted pursuant to subsection (b)(6) of the FOIA. Subsection (b)(6) exempts from disclosure personal information contained in medical, personnel, and similar files to the extent that disclosure would cause a clearly unwarranted invasion of personal privacy. The courts have held that application of subsection (b)(6) requires a balancing between the public interest and the individuals' rights to privacy. *See Department of Air Force* v. *Rose,* 425 U.S. 352 (1976). In this case, the public interest in which attorneys have been assigned to certain cases is *de minimus* and does not outweigh the individuals' interest in having such information withheld to prevent potential harrassment. In addition, portions of document A-1 which are log cards relating to other cases have been deleted as being outside the scope of this appeal.

A single deletion in document A-6, six pages of document A-9, and portions of A-21 have been withheld pursuant to section 6103(a). These deletions reflect return information, including taxpayer identification numbers, of unrelated third parties. This return information is protected by section 6103(a). Since the California Church has not shown that it fulfills any of the exceptions contained in section 6103(c) through (o), section 6103(a) prohibits disclosure of this return information. It should be noted that section 6103(a) has been held to qualify as a subsection (b)(3) statute. *See Slotnick* v. *Bureau of Internal Revenue,* 566 F.2d 1167 (1st Cir. 1977); *Belisle* v. *IRS,* 462 F. Supp. 460 (W.D. Okla. 1978).

IRS Administrative Memorandum for Reviewers dated January 13, 1981

VII. *Recommendations.* We recommend that the following documents be released in full: 2563, 4069-66, 5151, A-2, A-3, A-4, A-5, A-8, A-16, A-17, and A-19. Portions of A-7, A-11, and A-20 are outside the scope of this appeal but the remainder of those documents may be released. Documents A-1, A-6, A-9, A-10, A-12, A-13, A-14, A-15, A-18, and A-21 may be released in part subject to deletions pursuant to subsection (b)(6) or section 6103(a) or portions which are outside the scope of this appeal. Documents 6360-C, 3901, and 3907 may be released in part subject to subsections (b)(7)(C) and (b)(7)(D).

Two hundred seventy documents at issue in the FOIA I litigation are not open to re-examination under the doctrine of res judicata. Fourteen documents at issue in that litigation which were re-examined due to the possible impact of a material change in circumstances continue to be withheld pursuant to subsections (b)(5), (b)(6), (b)(7)(C), and (b)(7)(D) as enumerated above. Those documents which were indexed but not previously released in the Tax Court case and those documents generated subsequent to that index but involved with the Tax Court

IRS Administrative Memorandum for Reviewers
dated January 13, 1981

case are exempt from disclosure pursuant to section 6103 (e)(7).

/s/ ARTHUR L. LAPPEN
Arthur L. Lappen,
Reviewer

/s/ KATHLEEN E. WHATLEY
Kathleen E. Whatley,
Attorney

Dated: 13 January 81

IRS Response to Adminstrative Appeal
dated January 14, 1981

Jan. 14, 1981

Reverend James Morrow
Church of Scientology of California
5930 Franklin Avenue
Hollywood, California 90028

Dear Mr. Morrow:

This letter is in response to your letter dated September 17, 1980 wherein you filed a Freedom of Information Act (FOIA) appeal on behalf of the Church of Scientology of California seeking certain documents requested by letter dated May 16, 1980.

Because of the complexity of your initial request, we consider it to be important to explain how we construed your request, its scope, and locations which we searched. Your request refers to a Request for Production of Documents filed by the California Church in *Church of Scientology of California* v. *Commissioner*, Docket No. 3352-78 (U.S.T.C.) [hereinafter referred to as the Tax Court case] and an agreement by Paul Wilson, Assistant District Counsel (Los Angeles) to provide an index for the documents so requested with the exception of those documents indexed but not released and those documents released in *Church of Scientology of California* v. *IRS et al.*, Civil No. CV 74-3465-RJK (C.D. Cal. October 29, 1976) [hereinafter referred to as the FOIA lawsuit or FOIA I]. You requested: (1) all documents indexed in the Tax Court case; (2) all documents indexed but not released in the FOIA lawsuit, (3) all documents responsive to the Tax Court Request for Production not indexed; (4) all documents

were created or received by the Service subsequent to the last indexing; (5) all documents relating to Scientology, Church of Scientology, Hubbard, Dianetics, L. Ron Hubbard, or Mary Sue Hubbard located in 9 specified offices; (6) copies of all documents relating to activities of the Covington, Kentucky office regarding instruction of Service personnel in selecting Scientology related returns for examination; and (8) all documents relating to Scientology, Church of Scientology, Hubbard, Dianetics, L. Ron Hubbard, or Mary Sue Hubbard contained in the majority of the Service's systems of records (with the primary exception of those systems which are personnel related). Attached to your request was an authorization from Kenneth J. Whitman, President, Board of Directors, Church of Scientology of California, authorizing you to represent the California Church with regard to the May 16, 1980 FOIA request.

In processing this request in terms of the entities or individuals involved, we have limited its scope to documents pertaining to the California Church. Your authorization is only from the California Church, and you have not presented authorizations from any other Scientology entity or the Hubbards.

In terms of the offices searched, we caused a search to be conducted in the 10 offices specified by you, namely the offices of the Commissioner, Deputy Commissioner, Assistant Commissioner (Compliance), Assistant Commissioner (Technical), Assistant Commissioner (Employee Plans/ Exempt Organizations), Assistant Commissioner (Inspection), Audit Division (now Examination), Criminal Investigation Division, and Office of International Operations, and

the Covington, Kentucky office (the Cincinnati Service Center is located in Covington). These searches were not conducted in the field counterparts of any of the above enumerated functions. We also caused a search to be conducted in the 3 Commissioner offices and 12 Counsel offices referred to in the Privacy Act systems of records listing. These searches were to be conducted in terms of the FOIA request subject to the above-enumerated restrictions and not in terms of specific systems of records since the California Church is not an individual and cannot use the Privacy Act. These 15 offices are: Returns Processing and Accounting Division, Collection Division, Appeals Division, Chief Counsel, Deputy Chief Counsel (Administrative), Deputy Chief Counsel (Technical), Deputy Chief Counsel (Litigation Administrative Services, Criminal Tax Division, Disclosure Litigation Division, Employee Plans and Exempt Organizations Division, General Litigation Division, Interpretative Division, Legislation and Regulations Division, and Tax Litigation Division. No file counterpart offices were searched because the request was made to the National Office, not to the respective field offices. The District Counsel, Los Angeles, however, was searched because of the Tax Court case. The Disclosure Litigation Division file relating to *Church of Scientology of California* v. *IRS,* Civil No. CV 74-3465-RJK (C.D. Cal.) is missing. This file is a litigation file relating to the FOIA I lawsuit. Although we have searched all relevant offices, we have been unable to locate this file.

In terms of the documents at issue, we consider them to comprise 4 categories: (1) those documents denied in the FOIA lawsuit, (2) those documents indexed in connection

IRS Response to Administrative Appeal
dated January 14, 1981

with the Tax Court index and relating to the Tax Court case, (3) any documents generated subsequent to the Tax Court index and relating to the Tax Court case, and (4) any documents generated subsequent to the Tax Court index located in the National Office and relating to the California Church. We have considered any documents relating to any Scientology entity other than the California Church, any individual, or any litigation in which the California Church has been or is involved other than the FOIA lawsuit and the Tax Court case to be outside the scope of this appeal.

A. *FOIA I Documents.* The request which is the subject of this appeal specifically includes those documents which were denied in the FOIA lawsuit. On November 26, 1974, the California Church filed its complaint in *Church of Scientology of California* v. *IRS et al.*, Civil No. CV 74-3465-RJK (C.D. Cal.) seeking access to all records pertaining to "the activities, operation, or conduct of the Church of Scientology of California. A large-scale search by the Service located over 6,000 documents consisting of approximately 32,000 pages. These documents were indexed in a 1,600 page index, and the index was provided to the California Church on March 17, 1975. As a result of various requests, releases, and motions, the scope of the documents at issue was narrowed. On July 19, 1976, the court ordered the Service to designate the particular exemptions which were being asserted for the documents still at issue. On July 29, 1976, the Service filed Appendix A, a 312 page *Vaughn* index of the 290 documents remaining at issue, the exemptions being asserted, and discussions of how each exemption applied to the specified document. The Service filed its motion for summary judgment on August 30, 1976.

IRS Response to Administrative Appeal
dated January 14, 1981

On October 29, 1976, the court entered an order granting summary judgment in favor of the Service. In its findings of fact and conclusions of law, the court sustained each of the exemptions asserted by the Service. On December 28, 1976, the California Church filed a notice of appeal with the Ninth Circuit Court of Appeals. The California Church requested several extensions of time in which to file its brief. On September 7, 1978, the Department of Justice filed a motion to dismiss the appeal for failure to prosecute. The Court of Appeals granted this motion on October 23, 1978.

The doctrine of res judicata provides that a final judgment when rendered on the merits operates as an absolute bar to subsequent litigation between the same parties or those in privity with them upon the same cause of action. *See Montana* v. *United States,* —— U.S. ——, 99 S. Ct. 970, 973 (1979); *Lawlor* v. *National Screen Service Corp.,* 349 U.S. 322, 326 (1955); IB Moore, Federal Practice ¶ 0.405 [1] at 621-624 (2d ed. 1974); Res judicata binds the parties as to all grounds or defenses, whether or not raised, which were available to the parties regarding the cause of action and serves to promote conclusive resolution of legal disputes and conservation of judicial resources. *See Montana, supra* at 974; *Moore, supra* at 623-4; *Commissioner* v. *Sunnen,* 333 U.S. 591, 597 (1948).

In acting on behalf of the California Church, you are seeking access to those documents which were denied to the California Church in *Church of Scientology of California* v. *IRS et al.,* Civil No. CV-74-3465-RJK (C.D. Cal., October 29, 1976). Since that court reached a decision on the merits based on its findings of fact and conclusions of

IRS Response to Administrative Appeal dated January 14, 1981

law, the doctrine of res judicata is applicable to this subsequent attempt to obtain access to those documents pursuant to the FOIA. As a general rule, the conclusive effect of a judgment as res judicata is not altered by a subsequent change in circumstances. *See Moore, supra,* ¶ 0.415 at 2051. However, there is an exception to this rule when there has been a material change of circumstances. *Id.* at 2053. Since subsection (b)(7)(A) was asserted for certain of the documents at issue on the grounds of interference with an enforcement proceeding and since several years have passed, we reviewed these documents in order to segregate any documents for which subsection (b)(7)(A) was asserted as either the sole or a primary defense. Twenty of the 290 documents fell into this category, and we have reexamined these documents.

We have determined that documents 2563, 4069-66, and 5151 may be released in full. Documents 6369-C, 3901, and 3907 are being released with the exception of identities of or information concerning third party sources. A single deletion in document 6369-C is based on subsections (b)(7)(C) and (b)(7)(D). A deletion in the fourth paragraph of document 3901 is based on subsection (b)(7)(D), and the first paragraph of document 3907 is exempt pursuant to subsection (b)(7)(C).

With regard to the other 14 documents, we are continuing to withhold them pursuant to the other exemptions asserted during the lawsuit. These 14 documents and their exemptions are as follows:

35	(b)(5)
37	(b)(6)

IRS Response to Administrative Appeal dated January 14, 1981

236	(b)(5)
2600	(b)(5)/(b)(6)/(b)(7)(C)/(b)(7)(D)
2626	(b)(5)
2680	(b)(5)/(b)(6)/(b)(7)(C)/(b)(7)(D)
3092	(b)(5)
3257	(b)(5)/(b)(7)(D)
3930-24	(b)(6)/(b)(7)(C)
3930-O	(b)(6)/(b)(7)(C)
3930-Q	(b)(6)/(b)(7)(C)
5979	(b)(5)
5980	(b)(5)
6395-A	(b)(5)/(b)(6)/(b)(7)(C)/(b)(7)(D)

As for the 270 documents which were withheld primarily due to exemptions other than subsection (b)(7)(A), we assert the final judgment of *Church of Scientology of California* v. *IRS et al.*, Civil No. CV 74-3465-RJK (C.D. Cal., October 29, 1976) as a bar to this appeal pursuant to the doctrine of res judicata.

B. *Documents Contained in the Tax Court Index and Documents Generated Subsequently and Relating to the Tax Court Case.* You have requested access on behalf of the California Church to all documents which are indexed in the three volume index prepared in connection with discovery motions in the Tax Court case. Certain of these documents have already been released to the California Church in the Tax Court litigation. You have also requested access to all documents generated subsequently and relating to the Tax Court case. Those documents which have been indexed and not previously released and these documents generated subsequently and relating to

the Tax Court case are exempt from disclosure pursuant to I.R.C. § 6103(e)(7).

Section 6103(e)(7) provides that return information of a taxpayer may be disclosed to the taxpayer or person with a material interest (as defined in section 6103 (e)(1) through (e)(61) unless disclosure would seriously impair Federal tax administration. It has been held that, where return information is at issue, section 6103 is the sole standard governing disclosure. *See*, e.g. *Zale Corp.* v. *IRS*, 481 F. Supp. 486 (D.D.C. 1979).* Accordingly, the question is whether disclosure would seriously impair Federal tax administration.

With regard to the indexed documents not previously released, it is the Service's position that disclosure would seriously impair Federal tax administration by interfering with the ongoing Tax Court litigation. The discovery procedures which resulted in preparation of the three volume index were negotiated in the Tax Court case by counsel for both sides and the judge and are very complex and patterned to suit the needs of both the California Church and the Service. To permit the California Church through you to obtain access to these documents at this time by means of the FOIA would negate the procedures worked out in the Tax Court litigation that were accepted by the California Church and would allow the California Church to circumvent the Tax Court discovery rules. By disregarding the specific Tax Court discovery

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* The *Zale* opinion refers to section 6103(e)(6). Effective December 24, 1980, section 6103(e)(6) was redesignated as section 6103(e)(7) by the Bankruptcy Tax Act of 1980, Pub. L. 96-589.

procedures established in this case, disclosure would interfere directly with the on-going Tax Court litigation. In addition, disclosure would in certain instances reveal governmental strategy and attorney work product. It is, therefore, our position that disclosure of these documents which have been previously been released would seriously impair Federal tax administration.

With regard to the documents generated subsequently and relating to the Tax Court case, disclosure would interfere with that case by revealing governmental strategy and attorney work product and by reallocating personnel from preparing for and conducting the ongoing trial to reviewing these documents. It is our opinion that disclosure at this time would seriously impair Federal tax administration.

C. *National Office Documents Subsequent to Tax Court Index.* We have reviewed these documents and have determined that documents A-2, A-3, A-4, A-5, A-8, A-16, A-17, and A-19 may be released in full. Portions of A-7, A-11, and A-20 are outside the scope of this appeal but the remainder of those documents are being released.

Documents A-1, A-6, A-10, A-12, A-13, A-14, A-15, and A-18 are being released in part. References to Service personnel assigned to various cases, including in one instance a case assignment sheet which lists all attorneys in a particular division, have been deleted pursuant to subsection (b)(6) of the FOIA. Subsection (b)(6) exempts from disclosure personal information contained in medical, personnel, and similar files to the extent that disclosure would cause a clearly unwarranted invasion of personal privacy. The courts have held that application of subsec-

IRS Response to Administrative Appeal dated January 14, 1981

tion (b)(6) requires a balancing between the public interest and the individuals' rights to privacy. *See Department of Air Force* v. *Rose*, 425 U.S. 352 (1976). In this case, the public interest in which attorneys have been assigned to certain cases is *de minimus* and does not outweigh the individuals' interest in having such information withheld to prevent potential harassment. In addition, portions of document A-1 which are log cards relating to other cases have been deleted as being outside the scope of this appeal.

A single deletion in document A-6, six pages of document A-9, and portions of A-21 have been withheld pursuant to section 6103(a). These deletions reflect return information, including taxpayer identification numbers, of unrelated third parties. This return information is protected by section 6103(a). Since you have not shown that you fulfill any of the exceptions contained in section 6103 (c) through (o), section 6103(a) prohibits disclosure of this return information. It should be noted that section 6103(a) has been held to qualify as a subsection (b)(3) statute. *See Slotnick* v. *Bureau of Internal Revenue*, 566 F.2d 1167 (1st Cir. 1977); *Belisle* v. *IRS*, 462 F. Supp. 460 (W.D. Okla. 1978).

The Freedom of Information Act requires us to advise you of the judicial remedies granted in that Act. You may file a complaint in the United States District Court in the district in which the complainant resides, or has a principal place of business, or in which the agency records are located, or in the District of Columbia. The documents at issue are located in Washington, D.C. However, you should be aware that a recent opinion of the United

IRS Response to Administrative Appeal dated January 14, 1981

States District Court for the District of Columbia has held that section 6103 is the exclusive means by which the public can gain access to return information from the Internal Revenue Service. *Zale Corp., supra.* In the event that you decide to seek judicial review, please be advised that the Service is arguing, based upon the *Zale* case, that the court lacks subject matter jurisdiction.

Very truly yours,

/s/ GERALD G. PORTNEY

Enclosures:

As stated

Order of District Court dated June 18, 1982

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

FILED Jun 18, 1982

JAMES F. DAVEY, Clerk

Civil Action No. 80-3239

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Plaintiff,

v.

INTERNAL REVENUE SERVICE, *et al.*,

Defendants.

ORDER

Upon consideration of plaintiff's motion to require a detailed justification, itemization, and indexing of certain documents at issue pursuant to standards set forth in *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 77 (1974), the memoranda of points and authorities in support of and in opposition thereto, and the entire record herein, it is by the Court this 18th day of June 1982,

ORDERED that the motion for a detailed justification, itemization, and indexing be, and hereby is, denied.

/s/ NORMA HOLLOWAY JOHNSON
Norma Holloway Johnson
United States District Judge

Order of District Court dated June 18, 1982

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

FILED Jun 18, 1982

JAMES F. DAVEY, Clerk

Civil Action No. 80-3239

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Plaintiff,

v.

INTERNAL REVENUE SERVICE, *et al.*,

Defendants.

ORDER

Upon consideration of the motion of defendant Internal Revenue Service for leave to submit documents *in camera* and the entire record herein, it is by the Court this 18th day of June, 1982.

ORDERED that the motion for leave to submit documents *in camera* be, and hereby is, granted; and it is further

ORDERED that defendant will have until July 8, 1982, to submit for inspection the twenty-six documents located at the Internal Revenue Service National Office which contain portions alleged to be exempt from disclosure pursuant to 5 U.S.C. § 552(b)(6) (1976). It is further

Order of District Court dated June 18, 1982

ORDERED *sua sponte*, that defendant will have until July 8, 1982, to submit for *in camera* inspection all documents responsive to plaintiff's request which have been generated in connection with *Church of Scientology of California* v. *Commissioner*, Docket No. 3352-78 (U.S.T.C.), together with the three documents located at the Internal Revenue Service National Office, which have been determined by the Commissioner of Internal Revenue to be exempt from disclosure to 26 U.S.C. § 6103(e)(7) (Supp. IV 1980).

/s/ NORMA HOLLOWAY JOHNSON
Norma Holloway Johnson
United States District Judge

Order of District Court dated June 24, 1983

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-3239

FILED June 24, 1983

Clerk, U.S. District Court
District of Columbia

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
Plaintiff,

v.

INTERNAL REVENUE SERVICE,
Defendants.

ORDER

Upon consideration of the motion by defendant for summary judgment, plaintiff's opposition thereto, supporting and opposing memoranda of law and affidavits, the *in camera* inspection of documents at issue in the above-entitled action, and the entire record herein, it is this 24th day of June, 1983,

ORDERED that defendant's motion for summary judgment be, and hereby is, granted; and it is further

ORDERED that this action be, and hereby is, dismissed with prejudice.

/s/ NORMA HOLLOWAY JOHNSON
Norma Holloway Johnson
United States District Judge

Transcript of Oral Argument Before U.S. Court of Appeals dated December 5, 1985

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1856

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
Appellant,

v.

INTERNAL REVENUE SERVICE, *et al.*,
Appellees.

Thursday, December 5, 1985
Washington, D.C.

The above-entitled matter came on for oral argument, pursuant to notice, at 10:30 a.m.,

BEFORE:

CHIEF JUDGE ROBINSON, CIRCUIT JUDGES WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA, STARR, and SILVERMAN.

APPEARANCES:

ROBERT A. SEEFRIED, Esq., Suite 700,
1718 Connecticut Avenue, N.W., Washington,
D.C. 20009; on behalf of Appellant

JONATHAN COHEN, Esq., Internal Revenue Service,
Washington, D.C. 20530; on behalf of Appellee

Transcript of Oral Argument Before U.S. Court of Appeals dated December 5, 1985

CONTENTS

Transcript of Oral Argument Before U.S. Court of Appeals dated December 5, 1985

[3]

PROCEEDINGS

The Clerk: No. 83-1856, Church of Scientology of California, Appellant, v. Internal Revenue Service, et al.

Robert A. Seefried, Esq., for appellant; and Jonathan Cohen, Esq., pro hac vice, for appellee.

The Court: Mr. Seefried, you may proceed.

ORAL ARGUMENT OF ROBERT A. SEEFRIED, ESQ., ON BEHALF OF APPELLANT

Mr. Seefried: Thank you, Your Honor. My name is Robert Seefried and I am representing the appellant in this case and, with the Court's permission, I would like to reserve approximately three or four minutes for possible rebuttal argument.

The issues that we have been asked to address today concern not only the effective administration of the Freedom of Information Act but concern the goals and policies underlying the enactment of the Act by Congress.

The agency involved in this case today, the IRS, is the one governmental agency that affects every single individual in this country, organization, association, corporation or any other entity.

The result they are asking this Court to achieve today would in effect virtually exempt them from the Freedom of Information Act and give them carte blanche to withhold from disclosure any information that they gather during the [4] course of any intelligence operation or any other undertaking that the IRS decides to engage in during the course of its administration of the tax laws.

The issues today raise two questions, in my judgment.

Transcript of Oral Argument Before U.S. Court of Appeals dated December 5, 1985

One concerns whether or not 6103 is governed by the Freedom of Information Act, namely Exemption 3, and two, the proper interpretations of 6103 in light of the Seventh Circuit's decision in King, interpreting the Haskell Amendment and this Court's interpretation of the Haskell Amendment in Neufeld and subsequent decisions in Moody.

First of all, the Freedom of Information Act clearly in my judgment applies to 6103. There is nothing either in the legislative history of 6103 or the Act that would suggest in any way that Congress intended to exempt the IRS from complying with the strictures of the Freedom of Information Act when requests come to the agency for information that they maintain in their files and records.

The only decision that I am aware of is the King decision, which holds that—appellate decision, that is, of course—that holds that 6103 isn't governed by the Freedom of Information Act.

Question: Regardless of how you would have us interpret as a body, the substantive body of this, I gather that the big difference to you of whether or not the use of FOIA analytical framework for getting there through [5] Exemption 3, the big difference is the practical problem of whether you can get dedacted information which would stay with the FOIA analysis versus having a court look at 6103 in its entirety, including the Haskell Amendment, as something separate and apart, and look at it in terms of ordinary administrative review, deference, et cetera.

Mr. Seefried: In part, that is correct, Your Honor. The other aspect is, of course, that under the Act the agency has the burden of proof and under the Act there are certain—certainly in this circuit, anyway—procedural—

Question: An index and—

Mr. Seefried: Exactly, as well as under the Act, the Act itself specifically says any reasonably segregable non-exempt information ought to be disclosed. So there are extremely important reasons why the applicability of the Act to 6103, irrespective of how we treat the Haskell Amendment, are important here, and why I think this Court ought to reaffirm its long-standing position—Moody, Neufeld—going back to the original amendment of 6103 in '76, affirming the principle that this is an Exemption 3 statute and in fact the procedures applicable to treating Freedom of Information Act requests apply.

Now, with respect to the Haskell Amendment itself, what the government—

[6] Question: Excuse me, counsel, I'm confused. If 6103 is a statute referred to in Exemption 3(b), establishes particularly criteria for withholding or refers to particular types of matters to be withheld, then FOIA doesn't apply, is that correct?

Mr. Seefried: No, Your Honor, with all due respect, that is not correct.

Question: Explain why.

Mr. Seefried: If it is an Exemption 3 statute, the criteria that apply include not only that under FOIA they have the burden of proof and under FOIA the court conducts a de novo review of the agency's decision, whereas if it is under the APA there is no de novo review and the burden of proof is a different burden than is imposed under the FOIA.

So the principle that Exemption 3 are concerned, yet there is some agency discretion if there is a statutory authority for the agency to act in certain prescribed manners

as set forth in the exemption, but you still have to go through the criterion of Exemption 3, including, in my judgment, especially in a case like this, where we are talking about over several thousand pages of documents, some sort of an index of what it is the IRS had and was withholding. That never occurred in this case.

Now, what the government is arguing for with [7] respect to the Haskell Amendment is they interpret that to mean amalgamated statistical data which itself is not identifying information of a taxpayer. I suggest to you that, one, that doesn't comport with the plain meaning of the Haskell Amendment itself; number two, it doesn't comport with the legislative history underlying the enactment of 6103 or the amendment; and, three, as a practical matter it doesn't comport with the administration of the Freedom of Information Act.

Question: Certainly, the amalgamated part doesn't. I find it hard to get the concept of amalgamation from the kind of—what are tax models, do you know?

Mr. Seefried: Tax models, I believe—

Question: Your brief didn't cover that.

Mr. Seefried: That's correct, Your Honor.

Question: It was the other brief that went into it and I am a little confused as to what that is.

Mr. Seefried: The ACLU's amicus brief did go into it in some detail. Frankly, Your Honor, I don't know any more than what they put in their brief as to what a tax model is.

Question: It is refreshing to hear other people don't know either.

Mr. Seefried: Thank you. But as I understand it, a tax model is something that the IRS devises from [8] individ-

ual tax returns, line items taken off an individual's tax return and put in a model and it is put in as raw data.

Question: Is it ever just one return, with identifying factors taken off? In other words, might they take a model wage earner in a $5,000 category, take that return and take off the identifying material but otherwise keep the return intact, or is it always a mix-up of several returns? Do you know that?

Mr. Seefried: I do not know, Your Honor.

Question: Mr. Seefried, the problem I have with your interpretation is that it does sort of wash out the enumerations as contained in 6103(2)(a) which recites that the return information includes, and then it goes through this long list of taxpayers' identity, nature and sources of amount, blah, blah, blah, blah, blah. And what you are telling us is it really doesn't matter so long as it doesn't have the taxpayer's identity. That is a strange way to say that. Why would all that enumeration have been necessary?

Mr. Seefried: Well, the purpose, of course, to the enumeration and the purpose for the statute itself was because Congress was concerned with the abuses the IRS had been engaged in in the past. That is why 6103 was passed.

Congress knew at the time, number one, that private individuals had no chance of getting access to other people's tax returns. The privacy act was in effect and so [9] was the Freedom of Information Act in effect. What wasn't in effect was something to prevent government agencies, other government agencies from getting IRS data and that is why 6103 was passed, not to protect the public—I mean to protect the public from the government but not to protect the public from each other.

6103 was designed to eliminate the abuses, namely the

White House enemies list. As a matter of fact, my client happened to be one of the prominent members of it, and the whole scheme of the statutory structure deals with government agencies' access to taxpayer information. They wanted to make—Congress intended this to be as broad as possible to eliminate that.

Question: But just the names, not necessarily the names plus something else. It doesn't read return information means any of the following that is associated with a taxpayers' identity. It lists a number of parallels, correlative items—the taxpayer's identity, the major source and amount of income, and so forth. That seems to me stands on a parallel—

Mr. Seefried: The answer I think to the question, Your Honor, is a practical approach, how do you deal with this in the nature of a request, and the way you deal with it in our judgment is through the procedures established under the FOIA, not by the procedure which the IRS is asking [10] for here, that is, read it so narrow that there isn't any question, we will never have to comply with the Freedom of Information Act requests. And the problem isn't so much with the first seven, eight or nine lines of the definition of "tax return," the problem comes in with the latter section of 6103(2)(a), "or any other data received by, recorded by, prepared by, furnished to or collected by the Secretary with respect to a return or what respect to the determination of the possible existence of liability of any purpose."

And what the IRS is saying is that is all we do, we administer the tax laws, we collect, we receive, we record, we prepare information. It is all tax return information.

Question: Well, you are telling me that it is very broad.

I agree with that. What I am asking you is to tell me what else it means if it doesn't mean that, why that comprehensive parallel listing? It does not say that any of the following identifies somebody.

Mr. Seefried: The comprehensive parallel listing in my judgment had to do with Congress' concern that they would be as explicit as possible as to what kind of information was going to be covered by the definition, without leaving it up to the IRS to decide, well, it doesn't say anything about this, therefore we can give this to somebody [11] else.

The purpose of the Haskell Amendment was the recognition that was so broad that it virtually excluded everything from ever being disclosed to anybody.

Question: Let me see if I understand your argument. Suppose you had under 6103, somebody makes—under Freedom of Information, somebody makes a request and says I don't want to know their names, but I want things like the amount of income payments, exemptions, credit factors, liabilities of the top four oil companies in the United States, et cetera, and I don't want to know who they are, you can take off that information, but I want all this other kind of information that is listed in 6103 for the top ten or whatever oil companies, et cetera.

Now, it seems to me that the IRS would be perfectly within its rights in looking at that and deciding first it came under 6103 and then deciding whether it gave that information, given the context that it would indeed, you know, identify or fall without the Haskell Amendment, because everybody would know who was involved here, they would have to make that decision under the Haskell Amendment whether or not, under your theory of the Haskell

Amendment whether or not giving it out without the identity would in fact identify or associate it with.

Mr. Seefried: Your Honor, in our—

[12] Question: That is the theory of it that you are suggesting?

Mr. Seefried: You are absolutely correct, Your Honor. In our judgment, it ought to be left to a case by case development by the District Courts, just as surely as it is developed in other areas under the Freedom of Information Act.

Question: Of course, the IRS turns around and says—I am making their argument for them—that it is an impossible burden, how do we know all the pieces of the old mosaic theory out there, there is so much information out there that if we give you this you can put it together with that and everybody will know who you are talking about.

Mr. Seefried: Your Honor, District Courts and Courts of Appeals have never had a problem with dealing with that situation when it has arisen in other contexts under the Freedom of Information Act.

Question: Where they take the data out, certainly the intelligence agencies have been complaining for years, whether or not they are correct or not is another question, but there has been a lot of debate about that.

Mr. Seefried: I think the Supreme Court's decision in the CIA v. Simms pretty well put to rest the debate. But correct, there have been a lot of challenges in this Court, for heaven's sake, under 7(c) and 7(d) and [13] how far you go.

Question: I just want to know the practical consequences for the IRS, to make some guess about what is out there to put together with what they give out to identify them.

Question: You are not bringing a hypothetical case, you are bringing a real case. The information you sought was in fact exactly the kind of information that Judge Wald is asking about, isn't it?

Mr. Seefried: Well—

Question: You said remove the names and addresses, we want the information, but the fact of the matter is that if it was of the kind that you originally asked for in your request, you could have identified to some degree where that information came from.

Mr. Seefried: Your Honor, that is a difficult question to answer because of the posture in which this case happens to be in. We had, my client had an authorization for all records, tax return records or tax return information relating to it. It had one of the statutory authorizations. It was flat out entitled to it under the statute, unless the Secretary made his determination that it would seriously impair the effective information of the tax laws.

That issue doesn't have anything to do with the [14] Haskell Amendment and, inasmuch as I would like to address it today, it is not before the Court. But the IRS is saying though, we didn't have to search anything else, we didn't even have to look to see if there was any information in any other files concerning the Church of Scientology or the Scientology religion, because the Haskell Amendment only applies to amalgamated data and that has nothing to do with it, therefore we didn't even have to conduct a search.

The reasonableness of the search that the IRS could have conducted isn't what they say and we would have to go through every individual's tax return and try and locate whether they made a contribution to Scientology or didn't

make a contribution. That is ridiculous. That is controlled by the Freedom of Information Act and always has been; the reasonableness of the request concerning the burdensome of the search always comes up and always is resolved.

What was easy for the government to do in this case was to search their files for Scientology, tax-exempt organization files contained references to Scientology, Scientology-related organizations. There is not a thousand of them. There are 94. It was a virtual easy task. I would concede that under our request we weren't entitled to the tax returns or tax information relating to specifically [15] those individual organizations because we didn't have the authorization. But if in those files, which is a reasonable request and a reasonable search can be conducted through those files, contains information about Scientology generically, Church of Scientology generically or Church of Scientology of California specifically, because at that time it was the mother church in the country, then I think we had an entitlement to conduct that search.

And what they are asking for is if you interpret Haskell the way we want to do it, we know none of that information will ever be in there, therefore we will never have to search that stuff.

Question: Mr. Seefried, let me ask another question. As I told you, I find it hard to think this amalgamation requirement in that statute. On the other hand, couldn't it be read that such terms as not include data in a form, now in a form which cannot be associated—suppose the government would want to read it "data which has been placed in a form," that is that it did not come in in such a form, but that we placed it there by a nomination or otherwise.

Suppose we don't even go that far. Suppose we read

it as simply data that is in the IRS's files in such a form, whether it came in in such a form or whether they placed it in such a form, either way, it is in a form which [16] cannot be associated, blah, blah, blah. If we read it that way, why couldn't we say that all such data is return information, and since it is return information you cannot get it under 3, that is it is categorically return information and does not have to be redacted, just as you would not redact a return, tax returns are categorically exempted and no one suggests you have to go through them and eliminate identifying information. Why couldn't we also say the same thing about return information, that is, any information which currently, at the time you make your request, is in the IRS's files in such a form that it does not identify the taxpayer you can get, but if it is not already in that form the IRS has no obligation to go through its files and redact it by eliminating the taxpayer's name and therefore making all the rest available? Why wouldn't that be a feasible reading?

Mr. Seefried: Your Honor, I don't think it comports with Congress' intent, but as a practical matter the feasibility of that reading would result in the IRS simply going ahead, tapping in some tax identifying information on every single document they put in the file and they would never have to look at it.

Question: They do what?

Mr. Seefried: Put tax identifying information on every file because, remember, that was the response to the [16-A] question to Senator Haskell. Somebody said, hey, wait a minute, under this thing now people can't get those tax models any more because what would happen if all the IRS would have to do is put some tax identifying information on a document and people would never get it. And Haskell's response to that was oh, no, no, no, that is not the purpose of that. There was concern already back then that—

Question: How does his amendment stop that?

Mr. Seefried: Easy, you eliminate—

Question: (inaudible)

Mr. Seefried: Your Honor, his amendment is easy, you eliminate that tax stuff. Look, take a 17-page document, take Project Southwest, Mr. Moody's case.

Question: Would you just tell me how the Haskell Amendment eliminates that. The Haskell Amendment still exempts anything that can be associated with a taxpayer.

Mr. Seefried: Associated or otherwise identifies directly or indirectly a particular taxpayer.

Question: Well, I am not so sure, counsel. Wouldn't it be arbitrary and capricious, wouldn't it be tested under that standard if the Commissioner did exactly what you just described, artificially put tax return information on data in order to avoid disclosure under 6103, not under FOIA?

[16-B] Mr. Seefried: I would certainly agree that it would be arbitary and capricious.

Question: Well, I'm not so sure. If he put a taxpayer identifying number on every document which would identify where that document came from, I'm not so sure that he couldn't argue that there was sufficient administrative necessity for that and—

Question: Wouldn't you say, counsel, that would be arbitrary and capricious?

Question: —and the Haskell Amendment clearly wouldn't help you then, right?

Mr. Seefried: Sure, the Haskell Amendment—

Question: Haskell wouldn't help you, right?

Mr. Seefried: —you eliminate that identification, just like you do in a lot of documents that are released by the FBI. They don't want to release their file numbers.

Question: Only if you think—and this is the premise of my question to you—what you say is true only if you think that you must redact them, that the segregability provision of the Freedom of Information Act applies to it even if it is active, current information. What I am suggesting is an interpretation which says tax return information is a category which is exempted, just like CIA files under the new amendment to the Act. Once you see that it is tax return information, that is the end of the [17] matter, you don't have to redact it.

Question: And unless you can show it comes within the exemption, as it did under the main statute, so therefore it seems to me I would agree with Judge Scalia that the Haskell Amendment doesn't help that.

Question: So wouldn't you go back in the legislative history and point out that in fact one of the concerns even of 6103 and at the time the Haskell Amendment was the continued coexistence of FOIA with the information that Congress didn't want to be available, in which case to read out of the Haskell Amendment the FOIA normal procedures, so redaction would create something, maybe it isn't right but it is a different organist then—

Question: Create what the Seventh Circuit created.

Question: —it is a different organist.

Mr. Seefried: Well, if we are talking about legislative history, I mean even the agency itself, after the first amendment went into effect, testified before Congress that its in-

terpretation was the interpretation of something that we have asked for.

Question: What was that? Where—

Mr. Seefried: That was in the—

Question: That is in your brief somewhere?

Mr. Seefried: That was, as a matter of fact—

Question: I want to see the statement.

[18] Mr. Seefried: It is in the FOIA Clearinghouse brief, Footnote 3, page 5.

Question: What is the page again?

Mr. Seefried: Page 5 of the FOIA Clearinghouse, Professor Neufeld—

Question: Page 5, Footnote 3, is that what you said?

Mr. Seefried: Yes.

Question: That's fine. That would be perfectly consistent with the hypothetical description I just gave you. If they have a record which in its current form does not identify a taxpayer, it has to be released. But that doesn't give you the right to say here is one that does identify the taxpayer, take the taxpayer's name off of it and give it to me. That is—

Mr. Seefried: But what do we do with the example—here is the concern, what do we do with the example where they say—they prepare a 20-page memorandum and the first paragraph of the memorandum makes some statement to the effect that we are looking into the tax liability of the Church of Scientology, and then it goes on for the next 20 pages to talk about all sorts of their views of the Scientology religion and their views of Scientology religion versus other religions and their views of this and their views of that, that if redacted couldn't possibly identify [19] the particular—

Question: Right, it would eliminate that. That is broad. On the other hand, how do you explain the fact that other portions of 6103 provide, for example, that you can't turn information over to a House committee unless—tax return information, you can turn it over to a House committee if you delete the identifying information. It is totally useless. You don't need that provision at all, if it is not tax return information anyway.

Question: I don't know if this is an answer, but as I recall, FOIA itself is inapplicable to Congress. In other words, you don't have any—FOIA has an exception right in it that it doesn't apply to requests from Congress so that they wouldn't be caught in FOIA's own, but as a result—

Question: I wasn't talking about FOIA. I was talking about the definition in 6103, if it is not tax return information anyway, there is no need to give special permission to turn it over to the House, and your narrow reading of what is meant by tax return information is inconsistent with that special permission.

Mr. Seefried: If it is not tax return information and there is a FOIA request, 6103 never comes into play. If it is not return information, the problem is the way the IRS reads the words "return information." It [20] covers everything they ever got at any time.

Question: Is tax return information defined under 6103 or under FOIA?

Mr. Seefried: Of course, it is defined under 6103.

Question: And so the scope of that then governs whether FOIA applies or not, isn't that correct, clearly?

Mr. Seefried: Yes, clearly.

Question: So therefore once you define return informa-

tion—I don't see how you get out of Judge Scalia's trap then—the definition of return information under 6103 and FOIA can't possibly come into that ambit.

Question: Just to follow up then a little bit, what happens is FOIA is also, through Exemption 3, Exemption 3 says what another statute defines as not releaseable or releaseable only pursuant to specific things, then you read that and that hits you under 6103 which then defines return information.

Question: Right.

Question: But the bottom of the Haskell Amendment says but that term doesn't include information in a form and you at least would have at that point come back to FOIA and go the regular FOIA route, whereas your interpretation would keep that as part of the 6103 matter and never get back to FOIA. So in effect my next question to you was what is the difference between Judge Scalia's interpretation of [21] 6103 and the thing that we talked about the beginning, just saying there is a separate statute out there that has no relation to FOIA?

Mr. Seefried: The end result is the same, of course. I see my—

Question: Wait. Wait. The burden of proof, all the things you were telling Judge Silberman earlier, the burden of proof would remain on the government to show that there could be an exemption applied, correct?

Mr. Seefried: Under 6103.

Question: And there would be de novo review by the Court of whether the government properly excluded the information, all of those elements of FOIA would apply, wouldn't they?

Mr. Seefried: But the burden of proof in that situation

is not to show that the information if redacted couldn't identify the particular taxpayer. The burden of proof is simply is there anything on that document that is stamped on there, put on there for any administrative purpose whatsoever, unrelated to the—

Question: It doesn't give you as much as you want, but it is not accurate to say that there is no difference in that approach and simply saying that 6103 is a self-contained statute which simply supersedes FOIA entirely, there isn't any.

[22] Question: If there is a redaction, you are right, there are other aspects—

Question: As to redaction, it wouldn't make any difference.

Question: Would you get a Vaughn index under that, just as to what is return information and what is not return information?

Mr. Seefried: Obviously we would argue for that. We didn't get it here. My concern is the search that they are initially going to conduct, that is really where the concern comes because if you've got the authorization they've got to do it.

Question: But under Judge Scalia's interpretation you wouldn't get a search?

Mr. Seefried: I don't think you would.

Question: Except for information which is already in a form sitting in the IRS office.

Mr. Seefried: And as you know—well, undoubtedly you don't know, but the IRS has a number of record keeping systems, some of which of course pertain to particular taxpayers and some of which of course pertain to other things. But in the situation of disclosures of Operation

H and other operations, we never learn about them if the interpretation of—at least not through the Freedom of Information.

Question: Counsel, I am troubled about it. I go [23] back to my original point. As I read it, it seems to me that Exemption 3 refers to the paradigm of 6103 and once you are in 6103 you are in an entirely different disclosure procedure. Would you argue that it is unreviewable at that point?

In other words, assume arguendo, we are under 6103 and we do not come back to FOIA at all. Are you arguing that what the Commissioner of IRS does or does not do with return information is unreviewable?

Mr. Seefried: No, that wouldn't be my argument at all. Of course it would be reviewable.

Question: And what standard would it be?

Mr. Seefried: I would argue for the de novo standard.

Question: Under 6103?

Mr. Seefried: Because it is an Exemption 3 statute. You get there via Exemption 3. Just because you are there, what discretion you afford and how you interpret the Commissioner's statements and affidavits, that is one thing, but that doesn't mean, except in national security cases, that he has absolute authority and unreviewable authority.

Question: Even under 6103 it wouldn't be unreviewable, would it? It is still an arbitrary and capricious standard.

Mr. Seefried: But that is a different standard of proof.

[24] Question: Of course.

Mr. Seefried: Thank you.

The Court: Thank you, Mr. Seefried.

Mr. Cohen?

Transcript of Oral Argument Before U.S. Court of Appeals dated December 5, 1985

ORAL ARGUMENT OF JONATHAN COHEN, ESQ., ON BEHALF OF APPELLEE

Mr. Cohen: If it please the Court, I have a couple of things at the outset that I may be able to be helpful with with regard to questions particularly as raised by Judge Wald with regard to the tax models, with the caveat that I don't know very much about the tax model—

Question: No more than anybody else so far.

Mr. Cohen: I had, in anticipation that perhaps—

Question: A tax model, are you talking about income tax—

Mr. Cohen: No, no. I will tell you exactly what it is really. It is two rolls of computer tape, two big spools of computer tape and an instruction booklet that will cost you $2,100 to buy it from the Internal Revenue Service.

Question: So it is a model?

Mr. Cohen: And here is a partial printout of it. That is just a partial. It is called, if you would believe, "a dump," and that is two reels of magnetic tape—that is not the whole works, but indeed it is a line-for-line record.

However, when it is released to the public—there [25] is another version of this, by the way, that is not released and that is the one from which this data is extrapolated from.

In an effort to make sure that no disclosure of return information inadvertently occurs, the Service does what it calls blurring. This basically is averaging certain key items so that there could not by some happenstance be identification.

For the years '81 and '82—this happens to be an '83 one—they would blur, for example, real estate taxes, personal property taxes, alimony, both paid and received, general sales and motor vehicle tax. In addition, in '83 they added as a blurring factor salaries and wages.

Transcript of Oral Argument Before U.S. Court of Appeals dated December 5, 1985

Now, what could happen but for this blurring? It might illustrate the problems that we have been exploring this morning in terms of indirect identification, and why we submit it is very clear that the Haskell Amendment was meant to permit the release of the tax model and similar statistical studies that were in an amalgamation form—and I grant you, Judge Scalia, the statute nowhere uses the word "amalgamation," but of course by association with other returns that is what you end up with—and further that does not directly or indirectly identify particular taxpayers.

Judge Wald came in with a hypothetical example of a third-party requester who asks for the returns of the four [26] largest oil companies in the United States, don't bother giving me their names or addresses, you can remove all that, but that requester or any other tightly controlled industry knows from an independent source, perhaps court records, that one of those companies paid a whopping fine or a judgment in connection with a case and in due course gets the redacted returns, goes down the line and finds this in the schedule and knows exactly who it is.

Put another way, I request all the returns filed by people who live in my ZIP Code, take the names, addresses, identifiers off, but I know because one of my neighbors is talkative that he paid so much in property taxes during the year and another one who is talkative paid so much alimony during the year.

Now, the IRS doesn't know that I know that. It couldn't know that. But in fact by screening these returns I have an eagle eye for just what that is and I know exactly what it is.

Now, it seems to me that this illustrates the wisdom of two points: One, that 6103 should be viewed as an independent and non-disclosure statute. If we are going to talk here, as Mr. Seefried has apparently invited the Court to do on a somewhat more global level, of disclosure versus confidentiality, it appears very obvious that the Freedom of Information Act is a disclosure statute. It makes open to [27] public view the way agencies work. Fine.

6103 is a confidentiality statute that deals with the individual's privacy and his tax return and tax return information. The policy pulls are entirely different. 6103, if not the longest, is one of the longest and most highly articulated sections in the code, backed up with civil and criminal penalties. It is so strict in its confidentiality aspects that Congress itself needs special authorization to screen return information. Even 6108, the disclosure—

Question: What it lacks specifically, however, is any provisions for any member of the public getting information under 6103.

Mr. Cohen: But the public can get—

Question: Now, other statutes you can say are self-contained and simply displace the Freedom of Information Act entirely contain such—

Mr. Cohen: We have such statutes. We have 6108 and we have 6110—

Question: Right.

Mr. Cohen:—which do provide for just that type of relief provided it is indeed detoxified, and that is where

the public interest begins and ends as opposed to some morbid curiosity.

Question: Counsel, don't you have another section there that gives—6107, I don't have it with me—which [28] gives the Commissioner authority to release—I forget which section it is—general authority to release under the interest of the administration of the tax system?

Mr. Cohen: I think you may be thinking about 6103(e)(7), which is the—

Question: Yes.

Mr. Cohen: That is a different provision. I am talking now in terms of authorization to disclose to the public, you can go to 6108, which is the statistical publications—is that the one you have in mind?

Question: I think so.

Mr. Cohen: Okay.

Question: Why doesn't your reading of 6103 make it more or less superfluous?

Mr. Cohen: Not entirely, but it is certainly our view that the Haskell Amendment is redundant in the light of 6108.

Question: I don't understand why the two, if that is what Congress intended to do.

Mr. Cohen: Well, there is—

Question: As I read it over and over against the facts, it is the same. Your interpretation of the Haskell Amendment is 6108?

Mr. Cohen: That's right, and that is why Senator Long said he didn't think it was really all that necessary [29] if Senator Haskell—

Question: But don't congressional intention support that view anyway?

Mr. Cohen: I'm sorry, I can't agree with that.

Question: Well, where is it?

Mr. Cohen: It seems very clear that Haskell was worried, given the sweeping language of 1603(b)(2), that maybe legitimate scholarly use, state and local government of the tax model which had been going on since 1960 would be choked off, oh, my god, they've gone too far in defining return information. Well, 6108 was there, to be sure, but Haskell, perhaps not satisfied that one bite would be enough, thought that maybe he ought to have two and he suggested that under those circumstances, in order to continue to make available for legitimate scholarly use the tax model and similar studies, it would be important to say that, well, data in a form that—

Question: Well, what Congress normally does when they mean to pick up a section, they might just refer to it specifically and have a cross-reference from 6103 to 6108 and in a form looks different than what is in 6108.

Mr. Cohen: But also in a—

Question: And you are arguing that 6103 and 6108 are the same.

Mr. Cohen: Well, I would suggest that, more [30] important perhaps, there is the point that in a form that is not the same words that are used elsewhere in 6103.

Question: But they are used elsewhere in other sections.

Mr. Cohen: That is true.

Question: And you don't assert there that they are used in such a sense that the Service has to have itself aggregated information or placed—

Mr. Cohen: No, but that goes to your point which is that once it is in the Service's possession in a form that indeed identifies directly or indirectly a taxpayer, it be-

comes return information. It is not some totally unrelated scrap of paper.

Question: That's fine, but my point goes a bit beyond what you are arguing here and I would like to know how much difference it makes to you. That is to say you insist that somehow there have been some operations performed upon the data by the IRS, some aggregation of—

Mr. Cohen: For the tax model and things like that.

Question: Right.

Mr. Cohen: Yes.

Question: Right.

Mr. Cohen: That is true.

Question: Whereas the interpretation I was—the alternate interpretation I was suggesting, which I find much [31] more easy to derive from the simple language of the provision which I tend to go by, is whether you have done the work that has taken the name off of it or not, if it is in your possession in such a form that it does not identify—

Mr. Cohen: I think you are absolutely right. I don't disagree with that at all. If it is raw data, whether we have penciled things in on it or averaged it with its two neighbors on either side, if it is raw data it is return information. It does not lose that character until something is done to it.

Question: Well, you are not agreeing.

Mr. Cohen: I am.

Question: That is not what Judge Scalia said.

Mr. Cohen: Then I must have missed—

Question: Then you are making another argument and that is precisely the problem.

Mr. Cohen: Then I am sorry, I misunderstood you.

Question: Suppose you have information somebody has

submitted to you or you have gotten in the process of your investigation a statistical piece of paper that doesn't have a taxpayer's name on it, you can't identify the individual taxpayer.

Mr. Cohen: It is itself a statistical piece of evidence.

Question: Right. Why wouldn't that meet the [32] language of the Haskell Amendment? The only difference being you are not the one that did the aggregation that derived those figures.

Mr. Cohen: I think that would—

Question: It came in the mail to you, a tax return with the taxpayer's name off of it.

Mr. Cohen: In other words, someone sends in a piece of paper that has no identification characteristics on it—

Question: It is in your files.

Mr. Cohen: —we would have no way of—it would be hard to see how that would be return identification in the first instance, because I don't think it would fit within any of the other categories of 6103. It wouldn't be something from which we would determine liability or assessments or deductions. It would fail in the first place, but I—

Question: You have been to somebody's office in the course of taking over corporate records, and this piece of paper is among them, it has been acquired in the course of a—

Mr. Cohen: I think that would certainly be return information, absolutely.

Question: Even though there is no name on it?

Mr. Cohen: Well, I think it would be in a form [33] that we could by virtue of the fact that it goes to the liability—it has no identification at all, all it is is a sheet of paper—

Question: A sheet of figures.

Mr. Cohen: I don't know. Again, I think you would flunk out on the first part of the language of 6103 that it could not be used for the computation of the liability of a particular taxpayer.

Question: Let's assume you flunk you, it is not under return information, what procedure would you follow?

Mr. Cohen: In terms of—

Question: I suppose IRS still refuses to disclose it even though it is clearly not return information. What is the procedure?

Mr. Cohen: I would assume that under those circumstances it would clearly be an abuse of discretion and the Service would be obliged to cough it up by an appropriate—

Question: Are you under FOIA or are you under APA?

Mr. Cohen: We would submit that the proper approach would be that we are under the APA standard, that we are under 6103, but we have the burden, we concede that we have the burden of showing that material is return information. I don't think there is any way we can duck that burden, and if we don't carry that burden then I think the [34] court's inquiry ends. I don't think for a minute that we can hide behind some kind of stone wall. Let me try to disabuse the Court of that notion. And I think that—

Question: It would be under FOIA if it is not covered by 6103.

Question: You just gave an answer that is contrary to your reaffirmation.

Mr. Cohen: If it were not return information, then the

question would be if it would fall under FOIA, under one of the FOIA—

Question: The appellant keeps insisting and keeps claiming that everything you have in your files is return information. That is not the—

Mr. Cohen: Absolutely not. We are not—

Question: Give us an example other than the tax model, because one of the amicus briefs suggests that there are a whole range of documents that have been available to the public and would not be available were we to adopt your current interpretation.

Mr. Cohen: No, I can't, other than the statistics of income. There has been some hint in one of the amicus briefs that certain audit surveys, for example, were released. I can't say that there is a standard practice to make available to the public material of a particular type or a particular title. The only two that I am prepared [35] to speak to are the tax model and the statistics of income, and I—

Question: Let me go back to a hypothetical question. Frequently a congressional committee, the Finance Committee will request statistical information from you and you will submit that, but that clearly is not return information, and you concede to that.

Mr. Cohen: Absolutely.

Question: Now, suppose in turn, as frequently happens, Congress works on those figures and prepares a revenue tax statement or something and submits it to the IRS for their review and then it goes into your files, now that is not a statistical analysis you prepared—

Mr. Cohen: That's true.

Question:—but that would certainly be releaseable?

Mr. Cohen: I would think so. As I read 6108, I wouldn't have any trouble at all saying that should be releaseable.

Question: But not by reason of the Haskell Amendment?

Mr. Cohen: Right. It would be releaseable entirely under a separate statutory—

Question: Wait a minute, Haskell was for a totally different purpose.

[36] Mr. Haskell: At least in that context. What Haskell—

Question: How does it get releaseable? If all 6108 says is that the IRS must prepare a statistical summary every year, now if there are ten of these, keep nine, release one and it would have fully complied with 6108, couldn't it?

Mr. Cohen: Yes.

Question: Can I get one more hypothetical on this?

Mr. Cohen: Sure.

Question: Suppose somebody informs the IRS, say look, I have general information, I am not naming anybody specifically, that there is a class of truckdrivers getting kickbacks or something and gives great detail about the practice, doesn't name anybody. It goes into—it becomes at least a document that might be looked at, people might examine returns of truckdrivers in light of knowing about that particular practice, so it gets into truckdrivers—it is a bad example—it gets into truckdrivers' files because it is indeed received by, furnished to or collected by the Secretary with respect to a return. Okay. And somebody asks for this under the Freedom of Information Act and the question becomes, under the Haskell Amendment, does that data in a form which cannot be associated with or otherwise identified with a particular taxpayer, and let's [37] assume there is no way that it could be pinpointed to any particular taxpayer, but yet it does fall under

Transcript of Oral Argument Before U.S. Court of Appeals dated December 5, 1985

6103(a), and it seems to me it should fall under the Haskell Amendment, too. But I doubt from your conversation that it wouldn't fall under the Haskell Amendment because it is in 6103(a) and would be forever more, unless you blurred it and put it into a tax model, which you wouldn't do anyway.

Mr. Cohen: That you wouldn't do, no. I have to go back to the text of 6103 before the flush language—

Question: Do you think that it would—

Mr. Cohen: My answer basically would be that once that clipping is in there it is return information.

Question: Well, the Haskell Amendment, even if you took it literally, it just doesn't work, it can only operate in your business of blurring and tax models.

Mr. Cohen: That's right.

Question: When the IRS does something, when it takes that return information files and does something with them and makes a new product.

Mr. Cohen: That's right, and that is basically the approach taken by the Seventh Circuit in King—

Question: I know that.

Mr. Cohen: —and the Court, it seems to me, was wise in focusing—

Question: It was a very wise disposition. I wish [38] the Congress had thought of it.

Mr. Cohen: Well, part of the process—

Question: Judicial activism—

Mr. Cohen: Well, let's face it, the problem with 6103, like so many highly articulated statutes, is that it really doesn't seem to cover in the kind of tidy, nice everyday fashion what you think would be the more simple and important kinds of problems, so it is left to the courts.

Transcript of Oral Argument Before U.S. Court of Appeals dated December 5, 1985

Now, we have a phrase "data in a form" on which the circuits are divided. The Ninth Circuit says, well, take the identifiers off, what more do you need, and it can be released. The Seventh Circuit takes the position, now, wait a minute, this has a little different kind of a meaning, that it really means essentially that the data has to be both in a form that has caused it to lose its identification, that is, no indirect or direct identifiers, and in a form that causes it to lose the capability of determining the liability or tax of any individual—and this gets to your point.

A squeeler letter that comes in and says I happen to know that so-and-so isn't reporting income, it is stuck into the file of an individual taxpayer. It is raw data, it is very incriminating, it is like FBI raw data files perhaps in that regard, and it is indeed not disclosable because—

[39] Question: It wouldn't be disclosable under FOIA anyway.

Mr. Cohen: It might well not be disclosable under (b)(7) of FOIA—

Question: That is the problem. I mean once you are talking about information that, you know, will predictably run a risk of disclosure, I think it would be withheld under FOIA, and you don't need this—

Question: Once you left the early model data, about the fact that the Service cannot always know what is identifiable, that is why you need this broader coverage than otherwise, is because you can't tell—

Mr. Cohen: That's true. That's absolutely correct.

Question: —when that may be redacted—

Mr. Cohen: That's right. That was one of the reasons why we petitioned for certiorari in the Willamette Industries case, where you have a tightly controlled, small in-

dustry where presumably everybody knows what everybody else is doing, and one forest products company asks for data that will almost certainly identify another forest products company, a competitor.

Question: A curiosity.

Mr. Cohen: We don't know that.

Question: What you are arguing I think is that only if this Court adopts a key standard which says that it [40] must be in a manufactured form so that we know it can't be undone—

Mr. Cohen: That's right.

Question: —and they are the ones who put it together, otherwise you can't ask us to release it because we don't know—

Mr. Cohen: We don't know what you know. We don't know what you know.

Question: But the words of the Haskell Amendment don't say that.

Question: It should have read "material that has been placed in a form" or something like that.

Mr. Cohen: Yes. But under the circumstances, I think that our position is not only a reasonable and a proper reading of the statute, it is consistent within the overall fabric of 6103 itself and it is consistent with the policy objectives of 6103 as opposed to those of the FOIA. This is not going to stop a scholarly research and state governments and the other people who buy the tax model from being able to use it.

Question: But would you agree that even under your interpretation if you went at Exemption 3 you would have some burden?

Mr. Cohen: Oh, yes.

Question: Suppose the other side said we have [41] reason to believe that there is this squeeler letter—leave out Exemption 7, but just on your exemptions—in the file and it doesn't belong there because it really doesn't go to determining anybody's income tax, that you would have the burden at least of telling them what was in that file net the tax return definition.

Mr. Cohen: Yes.

Question: 6103. To do that, you would have to do something equivalent of a Vaughn index, wouldn't you?

Mr. Cohen: Well, we would have to come forward, I'm sure, with proof to show that from that it would lead to a determination.

Question: You would have to assert something.

Mr. Cohen: Right.

Question: This is the point that has troubled me right from the beginning. Let's assume we accept your definition of return information and we have a case. Are we testing your determination of whether it is return information under FOIA or under 6103 or under both? Phrase it through, exactly how it happens.

Mr. Cohen: Well, our position, which differs from Mr. Seefried to some extent, if we read 6103 as simply a (b)(3) statute under the FOIA, then presumably you have a broader scope of appellate review. If you read 6103 as an independent non-disclosure statute quite apart from the FOIA, [42] then you would test us under abuse of discretion. Either way, of course, we would be answerable to the Court.

Question: What discretion have you abused if somebody comes and says I want a document and you say what

entitles you to a document? If FOIA doesn't apply, where do they get off asking you for a document?

Mr. Cohen: Because there is in 6103(e)(7), if someone comes in and says I have a material interest in this, and we say yes, you do, but we decided that to release it to you would materially impact upon tax administration, and the claimant says, oh, no, it wouldn't and you are being arbitrary and capricious, and we would say, oh, yes, it would and we aren't.

Question: In other words, you say there is a disclosure obligation in 61, [*sic*] in that entire section, independent of FOIA? Is that what you said?

Mr. Cohen: It is not a—it is a non-disclosure statute but we—

Question: But it gives discretion to the Secretary to disclose?

Mr. Cohen: That's right, and the person can say, well, I have a material interest—

Question: Does that include scholars? That is the problem, it talks about o..ly—

Mr. Cohen: It might.

[43] Question: You could not file the return in the files from the corporation if it is a corporate return? I have a company and I say I want to look at your documents and you say—

Question: You are not suggesting that IRS's position is that—

Mr. Cohen: That's right, it would not. You would not have the kind of material—it is a non-disclosable document, that is what I said. It is a non-disclosable document.

Question: So in other words, you have to look at FOIA,

a scholar has to look to FOIA for the authority to get information out of the IRS?

Question: You can't possibly look to anything in 6103 or any of the other sections?

Question: You have an enforceable interest.

Mr. Cohen: Well, I think that is the kind of a—

Question: Suppose the IRS is fortuitously giving—this is an important issue now and I want to make sure I understand you, too, because it is a non-disclosure statute.

Mr. Cohen: That's correct.

Question: You are not suggesting anyone can pursue a cause of action under 6103 or related sections and compel you to release information? Right?

[44] Mr. Cohen: I don't think I understand exactly where you are coming from. If you—

Question: Well, what part of the question don't you understand?

Mr. Cohen: If you take 6103 and go through the way the statute is set up, it says in the (e)(7) exemption return information with respect to any taxpayer may be open to inspection by or disclosure to any person—this is in 6103—or disclosure to any person authorized by this subsection to inspect any return of such taxpayer if the Secretary determines that such disclosure would not seriously impair federal tax administration.

Question: Now, as you think about that, it says, number one, "may," which is no command of the Secretary and he says, well, I may but I choose not do; and, number two, it says "persons authorized by this subsection," and when you put those two together it is so far away from the Freedom of Information Act—

Mr. Cohen: Oh, absolutely.

Transcript of Oral Argument Before U.S. Court of Appeals dated December 5, 1985

Question: —or for scholars being able to get it—

Mr. Cohen: Absolutely, but I would submit that all of those elements, in fact in this case we have two or three of them involved, that there is a determination in the first instance, is it return information, is there [45] authorization, another determination, is it adequate authorization, and is there a determination that this would or would not seriously impair tax administration. I would submit that all of those, which operate independently of the FOIA, are subject to judicial review—

Question: A scholar could not come under that section, could they? Where would the authority come from?

Mr. Cohen: I think that a scholar could not. A scholar would be left to whatever would be publicly disclosable without—

Question: Suppose in the statistical abstracts over a period of time and then you stop them, is that decision subject to review at any time?

Mr. Cohen: Probably not, so long as 6108 were not violated. This is Judge Scalia's point, you come out with the one statistic a year and quit and do nothing else, I would suggest there would be no requirement of that.

The Court: Thank you, Mr. Cohen.

Mr. Seefried, you have exhausted your time. Do you feel that you need to make any response to the argument of the Service? We will give you two minutes for that purpose, if you want.

Transcript of Oral Argument Before U.S. Court of Appeals dated December 5, 1985

ORAL ARGUMENT OF ROBERT A. SEEFRIED, ESQ., ON BEHALF OF APPELLANT—REBUTTAL

Mr. Seefried: Not even that, Your Honor, seconds.

[46] The Court: All right.

Mr. Seefried: The question is what do they consider return information and what do they consider non-return information, and the problem insofar as our case, as made clear in their initial brief in the court below at page 38, anything in the files—

Question: They said that.

Mr. Seefried: —is return information, so they don't have to search the files.

Thank you.

The Court: Thank you, counsel. The case is submitted.

(Whereupon, at 11:45 a.m., the case in the above-entitled matter was submitted.)

Order of Supreme Court of the United States Granting Certiorari dated January 27, 1987

SUPREME COURT OF THE UNITED STATES

No. 86-472

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioner,

v.

INTERNAL REVENUE SERVICE.

ORDER ALLOWING CERTIORARI. Filed January 27, 1987.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

Justice Brennan and Justice Scalia took no part in the consideration or decision of this petition.

PETITIONER'S

BRIEF

No. 86-472

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioner,

v.

INTERNAL REVENUE SERVICE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

MICHAEL LEE HERTZBERG
275 Madison Avenue
New York, New York 10016
(212) 679-1167

ERIC M. LIEBERMAN*
ELLEN J. WINNER
RABINOWITZ, BOUDIN, STANDARD, KRINSKY & LIEBERMAN, P.C.
740 Broadway, 5th Floor
New York, New York 10003
(212) 254-1111

Counsel for Petitioner

*Counsel of Record

KENDRICK L. MOXON
Of Counsel

April 27, 1987

Questions Presented

1. Whether the IRS, in response to a Freedom of Information Act request, may, pursuant to 26 U.S.C. § 6103 (b)(2), refuse to disclose reasonably segregable portions of records which cannot be associated with or otherwise identify a particular taxpayer, unless the information has been "reformulated."

2. Whether 26 U.S.C. § 6103 was intended by Congress to shield from public disclosure IRS records sought under the Freedom of Information Act that do not identify or otherwise infringe upon the privacy interests of any taxpayer.

List of Parties

The parties to the proceedings below were the petitioner Church of Scientology of California and the respondent Internal Revenue Service.

Petitioner Church of Scientology of California has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 86-472

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

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v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONER

Opinions Below

On May 27, 1986, the Court of Appeals for the District of Columbia Circuit filed two separate opinions in the above-entitled proceeding. The panel opinion is reported at 792 F.2d 146 and is reprinted in the Appendix to the Petition for a Writ of Certiorari ("Pet. App.") at 24a. The *en banc* opinion, as it was originally issued in slip form, is reprinted at Pet. App. 38a. The *en banc* opinion was amended by order of the court dated July 11, 1986. The slip version of that order, which was not separately reported, is reprinted at Pet. App. 90a. The reported version of the opinion, which incorporates the subsequent amendment, appears at 792 F.2d 153.

The opinion of the district court is reported at 569 F. Supp. 1165, and is reprinted at Pet. App. 1a.

Jurisdiction

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on May 27, 1986. On the same day, an *en banc* opinion was filed by the court of appeals. The *en banc* opinion was amended on July 11, 1986. On August 12, 1986, Justice White ordered that the time for filing the petition for a writ of certiorari be extended to and including September 23, 1986. The petition was filed on that date, and was granted on January 27, 1987. The time for filing the brief for the petitioner was twice extended by the Clerk of the Court to and including April 27, 1987.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes Involved

26 U.S.C. § 6103,* *Confidentiality and disclosure of returns and return information,* provides in relevant part:

(a) *General rule.*—Returns and return information shall be confidential . . .

* * *

(b) *Definitions.*—For purposes of this section—

* * *

(2) *Return information.*—The term "return information" means—

(A) A taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and

(B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110,

but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

* The portions of 26 U.S.C. § 6103 which are directly at issue in this case are reproduced here. Additional portions of § 6103 referred to by the court of appeals are reproduced at App. 1a-4a, *infra*.

5 U.S.C. § 552, the Freedom of Information Act, provides in relevant part:

(a) Each agency shall make available to the public information as follows:

* * *

(3) . . . each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

* * *

(4)(B) On complaint, the district court of the United States in the district in which the complainant

resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

* * *

(b) This section does not apply to matters that are—

* * *

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

* * *

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

Statement of the Case

This case concerns the meaning of the "Haskell Amendment" which modifies the broad definition of tax "return information" in 90 Stat. 1667, 26 U.S.C. § 6103(b)(2) by adding:

> . . . but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.[1]

This issue is significant because it fundamentally affects the legal obligations of the Internal Revenue Service ("IRS" or "government") in response to requests for information under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. If the petitioner Church of Scientology of California's ("Church's") position is accepted, that, under the Haskell Amendment, information which does not identify a taxpayer is not return information, the IRS would be required under FOIA to delete identifying data and release non-identifying portions of documents responsive to a FOIA request. If, on the other hand, the court of appeals is correct that the Haskell Amendment requires a reformulation of information, in addition to deletion of identifying data, before the document becomes non-return information, then the IRS would be immunized from most disclosure, since there is no concomitant obligation under FOIA to reformulate documents.

The issue arose in the context of litigation regarding a request for agency records by the petitioner Church[2] to the respondent IRS pursuant to FOIA. The Church's request sought records relating to Church of Scientology entities, the religion of Scientology and the religion's founder and his wife.[3] Prior to the Church's FOIA request, a con-

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[1] The Haskell Amendment was a Senate floor amendment to a substantial rewriting of § 6103 under the Tax Reform Act of 1976. The amendment was named after its sponsor, Senator Floyd Haskell.

[2] The Church of Scientology of California is a not-for-profit religious corporation organized under California state law. At the time it initiated this litigation it was the senior church of the hierarchical religion of Scientology.

[3] The complete text of the Church's FOIA request, dated May 16, 1980, is reproduced in the Joint Appendix ("J.A.") at 17a-27a.

gressional committee which had conducted investigations into illegal information gathering by government agencies disclosed that the Church of Scientology had been a target of improper IRS information gathering wholly unrelated to tax matters.[4] The Church's request thus sought, *inter alia,* further documentation of violations of its Constitutional rights and those of its members and other Churches of Scientology.[5]

The Church brought an action in the United States District Court for the District of Columbia after the IRS failed to respond to its FOIA request. *Church of Scientology of California* v. *IRS,* 569 F. Supp. 1165, 1167 (D.D.C. 1983) (Pet. App. 2a).[6] After the suit was commenced the IRS released a small number of records, but refused disclosure of most of the files sought. A significant number of documents were withheld upon the IRS' claim that they constituted confidential tax return information, the disclosure of which was regulated exclusively by 26 U.S.C. § 6103, which prohibited their release.[7] The IRS also restricted the scope of its search, in part upon a claim that information in certain third party files consisted of "return information".

[4] *Final Report of Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans, Book III,* S.Rep. No. 755, 94th Cong., 2nd Sess. at 909 (1976) (*"Church Committee Report"*). The redrafting of § 6103 was in significant part a response to revelations of IRS misconduct, such as that documented in the Church Committee Report.

[5] *See* Supplement to Plaintiff's Motion to Require Detailed Justification, Itemization and Indexing at 4, April 15, 1981.

[6] References to "Pet. App." are to pages in the Appendix to the Church's Petition For a Writ of Certiorari.

[7] The IRS asserted that disclosure of some documents was prohibited on other grounds as well. These claims are not relevant to the case in its present posture.

The district court denied the Church's motion for a "Vaughn" index[8] of the withheld material, and instead ordered the IRS to submit certain categories of disputed documents to the court for *in camera* inspection. 569 F. Supp. at 1168 (Pet. App. 3a-4a). After conducting its *in camera* review the district court issued an opinion dated June 24, 1983, granting summary judgment to the IRS. The district court in all respects sustained the IRS' stated rationale for withholding individual documents or categories of documents, as well as the IRS' limitation on the scope of its search. In so ruling, the district court agreed with the government that § 6103(b)(2) of the Internal Revenue Code superseded and operated independently of the Freedom of Information Act, so that the IRS' response, insofar as it was based upon a refusal to produce or search for return information, was governed by the "arbitrary and capricious" standard of the Administrative Procedure Act, 80 Stat. 393, 5 U.S.C. § 706(2)(A), and not the *de novo* review standard of FOIA. 569 F. Supp. at 1170 (Pet. App. 7a).

On the Church's appeal, a unanimous panel of the court of appeals ruled, *inter alia,* that § 6103(b)(2) did *not* supersede FOIA, but rather was a FOIA "exemption" statute under 5 U.S.C. § 552(b)(3), therefore subjecting the IRS' administrative response to *de novo* review under FOIA. *Church of Scientology of California* v. *IRS,* 792 F.2d 146, 148-50 (D.C. Cir. 1986) (Pet. App. 27a-30a).[9] The court of appeals panel also held that "the District Court erred in accepting the IRS' blanket assertion that all information responsive to the Church's request in files not relating

[8] *Vaughn* v. *Rosen,* 484 F.2d 820 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 977 (1974), provides that the government will ordinarily be required to support its claim for FOIA exemptions by furnishing a detailed index of the requested documents and its rationale for applying the exemptions.

[9] The government did not cross-petition from this determination by the court of appeals.

to the California Church was exempt from disclosure." 792 F.2d at 152 (Pet. App. 34a). The panel recognized that the IRS' refusal to search such third party files could only be justified upon an erroneous premise that "as a matter of law, all information in IRS files is return information." 792 F.2d at 151 (Pet. App. 34a). The panel, however, rejected the Church's assertion that upon remand there must be a document by document examination of those third party files which in fact do contain return information so that, pursuant to the segregability requirement of FOIA, 5 U.S.C. § 552(b), "identifying material" may be deleted from return information. 792 F.2d at 151 (Pet. App. 33a).

This critical determination by the court of appeals panel was based upon a separately issued opinion by the court sitting *en banc*, which rejected the Church's argument that under the Haskell Amendment return information consists only of data which identifies or can otherwise be associated with the taxpayer to whom it pertains.[10] Following oral argument before the panel, the court of appeals had determined *sua sponte* to reconsider the meaning of the Haskell Amendment *en banc* in view of conflicting interpretations of its language in *Neufeld* v. *IRS*, 646 F.2d 661 (D.C. Cir. 1981) and *King* v. *IRS*, 688 F.2d 488 (7th Cir. 1982).[11]

A majority of the divided *en banc* court overruled the earlier interpretation of the Haskell Amendment in *Neufeld*, which, drawing upon the analysis of the Ninth Circuit Court of Appeals in *Long* v. *IRS*, 596 F.2d 362 (1979), *cert. denied*, 446 U.S. 917 (1980), had supported the Church's position that information which neither identifies nor can otherwise be associated with a taxpayer is not return information under § 6103(b)(2).[12] The *en banc* majority also rejected the Seventh Circuit's construction of the Haskell Amendment in *King* which the government urged as the correct standard. The Seventh Circuit had determined that the Haskell Amendment is satisfied only if the IRS data has been reduced to an "amalgamated" statistical tabulation not associated with any particular taxpayer. Instead, the *en banc* majority ruled that in order for information not to be defined as return information, it must not only fail to identify or be associated with any taxpayer, but additionally must in some unspecified manner be "reformulated," other than by mere deletion and segregation of identifying materials.

The proper interpretation of the Haskell Amendment was the sole issue addressed *en banc*. The majority opinion began with a "textual analysis" of § 6103(b)(2). It catalogued redundancies and superfluities which it perceived resulted from the juxtaposition of the *Long* court's definition of the Haskell Amendment with other portions of § 6103 and certain other statutes. 792 F.2d at 156-58 (Pet. App. 42a-46a). The majority also rejected the *Long* interpretation of the Haskell Amendment based upon its assessment of "plausible legislative intent."[13] 792 F.2d at 158-60 (Pet. App. 46a-50a).

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[10] Under the Church's interpretation, return information potentially could be rendered into disclosable non-return information by following FOIA's procedure of redacting the identifying characteristics from the document.

[11] The court's order defined the issue as follows:

> Should the Court adhere to the interpretation of 26 U.S.C. § 6103(b)(2) adopted by the panel opinion in *Neufeld* v. *IRS*, 646 F.2d 661, 665 (D.C. Cir. 1981), or should it adopt a different interpretation, in particular that announced by the Seventh Circuit in *King* v. *IRS*, 688 F.2d 488, 490-94 (7th Cir. 1982)?

[12] The *en banc* decision, reported at 792 F.2d 153 (D.C. Cir. 1986) (Pet. App. 38a), consisted of three opinions: the majority opinion by six judges, which is the direct subject of this brief; a dissent by three judges; and a concurring opinion by a single judge.

[13] In this discussion, the majority referred to the Haskell Amendment as "ill-considered," and to Congress as "befuddled." 792 F.2d at 159-60 (Pet. App. 49a-50a).

Having repudiated *Long,* the majority then sought to arrive at its own definition of the language in question, stating that "[i]t is much easier to discern what the Haskell Amendment does not mean . . . than what it does." 792 F.2d at 160 (Pet. App. 50a). The majority focused on the phrase "in a form," and analogized those words from the Haskell Amendment to the same phrase in two other subsections of § 6103 which, in its view, referred to "reformulated" return information. 792 F.2d at 160-61 (Pet. App. 50a-52a). The majority thus imported a reformulation test to the Haskell Amendment in its ruling:

> We hold, more broadly than *King,* that as used in § 6103(b)(2) the phrase 'data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer' requires—in addition to the fact of non-identification—some alteration by the government of the form in which the return information was originally recorded. That reformulation will typically consist of statistical tabulation or of some other form of combination with other data so as to produce a unitary product that disguises the origin of its component (*as in the tax model*).

792 F.2d at 163 (Pet. App. 56a) (emphasis supplied).

The *en banc* majority declined to define "other manners of reformulation" which would be included within its definition. However, it stressed at length that its view of the Haskell Amendment permitted disclosure of the IRS "tax model," while the interpretation of the government and the *King* court was unduly narrow because it logically would exclude the tax model. 792 F.2d at 161-63 (Pet. App. 52a-57a). The majority quoted from Senator Haskell's statement on the Senate floor that his Amendment was intended to permit the IRS to "continue to release for research purposes statistical studies and compilations of

data, *such as the tax model,* which do not identify individual taxpayers." 792 F.2d at 161 (Pet. App. 53a) (emphasis supplied). The majority stated that its interpretation of the Haskell Amendment accommodated this express legislative purpose because the tax model was a reformulated tax return. 792 F.2d at 162 (Pet. App. 54a).[14]

Subsequent to the release of the *en banc* opinion, the court was advised, through a motion to amend the opinion by an amicus,[15] that it had misunderstood the nature of the tax model. At the time the Haskell Amendment was enacted, and for the ensuing four years, the tax model was *not* a reformulated tax return, but rather "an actual return with identifying details eliminated." 792 F.2d at 162 (Pet. App. 91a). Thus, at the very moment when Senator Haskell stated that his Amendment was intended to ensure continued release of documents such as the tax model, the tax model consisted of exactly the kind of redacted information which the Church maintains may be released under the terms of the Haskell Amendment. Despite this, the *en banc* majority did not revise its opinion in an effort to reconcile its rationale with the new evidence that it had based its opinion upon an erroneous factual premise. Rather, the majority merely amended that por-

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[14] A single judge wrote an opinion in which he concurred with the *en banc* majority in so far as it overruled *Neufeld,* but rejected the majority's new interpretation of the Haskell Amendment. The concurring judge asserted that under the principles stated in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), the court should have deferred to the IRS' administrative interpretation of the Haskell Amendment. 792 F.2d at 170-72 (Pet. App. 72a-75a). The *en banc* majority asserted that the concurrence was flawed because the IRS had maintained no consistent agency position in interpreting the Haskell Amendment. 792 F.2d at 162 n.4 (Pet. App. 54a n.3). [Note: Due to the amendment of the *en banc* opinion through the addition of footnotes, some of the footnote numbers in the reported and unreported versions of the opinion are at variance.]

[15] The American Civil Liberties Union of Washington.

tion of its decision which recited the inaccurate description of the tax model.[16]

The dissenting *en banc* opinion stated that "[t]he *Neufeld* approach . . . comports best with Congress' balancing of the strong interest in taxpayer privacy and the equally strong interest in disclosure under the Freedom of Information Act whenever taxpayers' privacy rights are not implicated." 792 F.2d at 172 (Pet. App. 77a). The dissent reasoned that there was nothing in the statutory text or structure of § 6103 to support the notion that wholly non-identifying information may not be disclosed unless it has been put in a different "form," and that such an extreme requirement was at odds with the majority's own recognition that "there is no reason why Congress would have wanted to forbid the disclosure of information which would not threaten the privacy of individual taxpayers." 792 F.2d at 158 (Pet. App. 46a). The dissent refuted the majority's view that statutory inconsistencies compelled their position, pointing out that under the majority's interpretation, there were similar inconsistencies and redundancies. 792 F.2d at 176-77 (Pet. App. 84a-86a). Further, the dissent demonstrated that both the legislative history and purpose, as well as a practical understanding of the nature of floor amendments such as the instant one, compelled the conclusion that petitioner's position was correct. The dissent concluded:

> The court today overreads an everyday casual phrase of no certain content to impose an important new and comprehensive restriction on disclosure of items listed in § 6103(b)(2), a requirement that does nothing in itself to advance the cause of taxpayer privacy. The majority adopts a 'reformulation' test which Congress never intended, and which the majority itself is unable to define. In so doing, the court has misread the thrust of the Haskell Amendment and effectively emasculated its application. The Court has, in the most classic sense, elevated 'form' over substance.

792 F.2d at 178 (Pet. App. 89a).

[16] The dissenting opinion was also amended. The dissenting judges pointed out that the majority's reformulation test was based on a false premise about the nature of the tax model, which, although found by the majority to be disclosable pursuant to § 6103, is itself *not* a reformulated document. 792 F.2d at 175 n.7 (Pet. App. 92a).

The interpretation of the Haskell Amendment by the *en banc* majority dictated the terms of the remand to the district court by the court of appeals panel. Incorporating the *en banc* court's definition of return information, the panel concluded:

> The mere deletion of identifying material will not cause the remainder of the return information to lose its protected status, and document-by-document examination to determine the possibility of redaction for that purpose is therefore unnecessary.

792 F.2d at 151 (Pet. App. 33a).

The court of appeals panel implicitly recognized that the IRS is not required to "reformulate" return information in its files in order to provide "reasonably segregable" portions of otherwise exempt documents in accordance with FOIA, as it would have to if redaction of identifying information alone satisfied the Haskell Amendment. Thus, the court of appeals panel provided that upon remand the IRS might make wholesale assertions that the third party files need not be searched because they consist solely of return information:

> In light of the foregoing discussion, the IRS must either conduct a new search for information responsive to the Church's request that refers to third parties or establish through affidavits that all information about third parties in identifiable files requested by the Church is generically protected by Section 6103.

792 F.2d at 152 (Pet. App. 36a).

The government has itself acknowledged that "[t]he remand proceedings would be conducted quite differently if the [*en banc*] majority's interpretation of the Haskell Amendment were reversed by this Court." Brief For the Respondent in response to the Church's Petition For a Writ of Certiorari at 8 n.*.

Summary of Argument

1. The Haskell Amendment provides that "data in a form which cannot be associated with or otherwise identify . . . a particular taxpayer" is not tax return information. The plain language supports the Church's position that, in response to a FOIA request, the IRS must delete identifying information and release any reasonably segregable portions of documents responsive to the request, since, in such redacted form, the data is not tax return information. The plain language does not support the position of the court of appeals that some kind of *re*formulation in addition to redaction is necessary in order for a document to lose its character as return information. There is nothing in the language which suggests that any redrafting or other manipulation of a document was contemplated. Nor, as the court of appeals itself found, does the plain language support the position urged by the IRS below that only data which has been redacted and further amalgamated into a statistical format can be released.

2. The legislative history of the Tax Reform Act of 1976, and of the Haskell Amendment itself, support the Church's interpretation of the Amendment. The focus of Congress throughout the initial drafting of 26 U.S.C. § 6103 was to guard against the IRS improperly releasing tax return information about identified taxpayers within the government for partisan political purposes. Disclosure to the public was not addressed until after the legislation had already been drafted, when the Haskell Amendment was offered from the Senate floor. The Amendment did not

introduce an inconsistent element into the statutory scheme, as the court of appeals asserted; rather, because it only permits disclosure of non-identifying information to the public, it is fully consistent with the legislative purpose as a whole.

The legislative history of the Haskell Amendment supports the Church's position. Addressing whether the IRS could avoid its previously-existing obligation to disclose statistical studies to the public simply by adding identifying information, the Amendment's sponsor explained that the IRS would not be able to do so since its previously-existing obligations to disclose such studies to the public would continue. The example of a disclosable document used by Senator Haskell was the tax model, which was, at the time that this discussion took place, a compilation of actual raw data from tax returns, which had not been reformulated or amalgamated. Although the court of appeals eventually recognized (in its amendment to the *en banc* opinion) that the tax model was a redacted document, it did not revise its holding.

The Church's view of the Haskell Amendment's meaning is confirmed by subsequent legislative history. In 1981, in response to two Ninth Circuit decisions (*Long* v. *IRS*, 596 F.2d 362 (1979), *cert. denied*, 446 U.S. 917 (1980) and *Long* v. *Bureau of Economic Analysis*, 646 F.2d 1310 (9th Cir. 1981), which had held, as the Church argues here, that data from which identifying information has been redacted is not return information and can be released under FOIA, Congress reconsidered the meaning and effect of the Haskell Amendment. Congress approved the continuing vitality of the Ninth Circuit's interpretation when it amended the Haskell Amendment to exclude only information relating to audit criteria.

The Church's interpretation of the Haskell Amendment is further supported by the IRS' prior interpretation to the same effect.

3. The court of appeals' *en banc* majority pointed to redundancies and alleged inconsistencies within the Tax Reform Act of 1976 under the Church's interpretation of the Haskell Amendment. There is some superfluous language under the Church's as well as the court of appeals' interpretation. But contrary to the court of appeals' opinion, there are no inconsistencies. The Church's interpretation of the Haskell Amendment is consistent with the statute's overwhelming concern that identifying data be protected from disclosure. It is consistent with interpretations made by the IRS and by other government agencies whose disclosures are regulated by the statute. The superfluities of language are not inconsistent with the legislative purpose, and they are explained by the fact that the amendment was offered after the rest of the statute had been fully drafted. Further, the Church's interpretation gives meaning to all the words of the Haskell Amendment, while the court of appeals' interpretation does not.

4. The Church's interpretation of the Haskell Amendment is consistent with the public policy concerns expressed by Congress in drafting FOIA as well as the Tax Reform Act of 1976. The purpose of § 6103—to prohibit unauthorized intragovernmental disclosure of tax return information about identified individuals—is wholly consistent with FOIA's mandate to maximize disclosures to the public which do not compromise individuals' privacy. The Church's interpretation of the Haskell Amendment fully protects individual privacy interests, and does not interfere with tax compliance efforts. The IRS should not be allowed to use the Haskell Amendment to evade its disclosure obligations under FOIA.

ARGUMENT

POINT I

The Plain Meaning Of The Haskell Amendment Is That Information Which Cannot Identify A Taxpayer Is Not "Return Information" Under 26 U.S.C. § 6103 (b)(2).

The meaning of the Haskell Amendment is the issue in this case.[17] "[T]he starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 756 (1975), (Powell, J., concurring). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Bread Political Action Committee* v. *Federal Election Commission,* 455 U.S. 577, 580 (1982). *See also Garcia* v. *United States,* 469 U.S. 70, 75 (1984). Consideration of this case, then, must begin with the language of the Haskell Amendment.

The Haskell Amendment, which follows immediately after a detailed definition of return information in 26 U.S.C. § 6103(b)(2), modifies that definition to exclude from its terms

> . . . data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

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[17] Resolution of this issue has great bearing on responses by the IRS to requests for information under the Freedom of Information Act, 5 U.S.C. § 552. If the Church's interpretation of the Haskell Amendment is accepted, then pursuant to FOIA the IRS must redact return information and release the remaining, nonexempt, portions of documents. If, however, the reformulation test imposed by the court of appeals is upheld, the IRS will, as a practical matter, be significantly freed of any obligation to release information under FOIA, since there is no requirement in that statute to reformulate records to render them disclosable.

The Amendment does not specify any particular form in which IRS data must be presented in order to escape classification as return information. Rather, it presents a simple and straightforward equation: data which could be used to identify a taxpayer constitutes return information; conversely, data which does not contain identifying information is not return information.

Focusing on the phrase "in a form . . ." the *en banc* majority held that the Haskell Amendment contemplates a *re*formulation of data. However, the words "in a form" do not imply that any particular form, or any manipulation of form, was intended. Nor does the language suggest any obligation to create a new or different form. Rather, as the dissenting opinion states, this common phrase is employed in the Haskell Amendment as a "linguistic aide" and a "transitional technique of drafting," 792 F.2d at 175 (Pet. App. 83a), and the statute is most "easily-understood as saying that the *substantive* types of information listed in § 6103(b)(2) are not 'return information' if they can be disclosed in a *manner* that cannot identify a taxpayer." 792 F.2d at 174 (Pet. App. 80a) (emphasis in original). Since deletion of identifying information renders the rest of a document into disclosable form, this process takes the non-identifying portions out of the definition of "return information." 792 F.2d at 173 n.3 (Pet. App. 79a n.3).[18]

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[18] In light of the plain, common sense meaning of the statute, it is difficult to understand the *en banc* majority's point that if Congress meant merely to exclude identifying information, it would have done so more directly. 792 F.2d at 157 (Pet. App. 43a-44a). It is hard to imagine clearer language in a definitional section, stating in precise terms what is excluded from the definition (the term return information "does not include data which cannot . . . identify . . . a particular taxpayer"). The alternate formulation suggested by the court—an inclusionary rather than exclusionary structure ("the term 'return information' means the following information that can be associated with or identify a

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The Church's position flows directly from the statutory language, which by its clear terms prohibits the release of identifying information only. The Haskell Amendment sets forth a prophylactic rule designed both to protect the individual taxpayer's privacy and to facilitate release of non-exempt information to the public under the Freedom of Information Act. Under this rule, the IRS, in reviewing documents responsive to a FOIA request, must examine each document to determine whether it contains information associated with or identifying a taxpayer, which reasonably may be deleted.[19] The remaining portions of the document are then disclosed pursuant to the Freedom of Information Act.

This was the interpretation of the Haskell Amendment adopted by the Ninth Circuit Court of Appeals in *Long* v. *IRS*, 596 F.2d 362 (1979), *cert. denied*, 446 U.S. 917 (1980). The District of Columbia Circuit Court of Appeals later applied the *Long* analysis in *Neufeld* v. *IRS*, 646 F.2d 661 (D.C. Cir. 1981), and determined that "return information, properly defined, includes only information that directly or indirectly identifies a particular taxpayer. . . ." 646 F.2d at 665.

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particular taxpayer," *id.*) is not more inherently clear or logical than the formulation used by Congress. Further, the fact that Congress adopted this language late in the legislative process explains why the exclusionary approach was selected; the adoption of a succinct statement in exclusionary form obviated the need for a total revision of the already-drafted statute.

[19] The IRS, of course, has the authority and the obligation under § 6103 to delete not only data which directly identifies a taxpayer (such as name, address and social security number), but also *any* information which might lead to such identification. The type and amount of information which would need to be excised to protect an individual taxpayer would vary, depending upon the nature of the FOIA request and the nature of the document in question. The determination of what deletions are appropriate is left to the IRS in the first instance and is typical of determinations routinely made by government agencies in response to FOIA requests.

The *en banc* majority of the court of appeals rejected the *Long* and *Neufeld* view and concluded that by inclusion of the words "in a form," Congress meant to require a "reformulation" of data before it could be released. The majority was unable to define what it meant by "reformulation." The court's original attempt to proffer the tax model as an example of a correctly reformulated document failed once the tax model was revealed to be a compilation of actual raw tax data rendered anonymous precisely by means of deletion and segregation, but not otherwise changed in form. 792 F.2d at 162-63 n.3 (Pet. App. 90a-91a). The court made no other attempt to define reformulation, but merely rejected the dissent's suggestion that a narrative rendering of redacted information would meet the test. 792 F.2d at 163 n.5 (Pet. App. 57a n.4). The fact that the majority itself could not furnish a meaningful definition of "reformulation" makes it unlikely that Congress intended to impose any such inflated meaning on the common phrase "in a form." [20]

If the words "in a form" do suggest, as the *en banc* majority believed, some physical change of the form of the document, it is inconceivable that the change of form intended was limited to the extensive but undefined (and perhaps undefinable) "reformulation" that the court of appeals read into the statute. Rather, it is clear that Con-

[20] As the dissent noted:

> The glaring deficiency with the majority's 'reformulation' test is that it never specifies from *what* original form the reformulation must be done and just what satisfies the reformulation requirement. The majority refers to 'some alteration by the government of the form in which the return information was originally recorded.' *Id.* at 163. Yet the IRS obviously has information in its files in hundreds of different developmental stages. For example, notes of an investigation, abstracts of an investigation, list of investigations done in a week, etc. . . . To say that there must be 'reformulation' does not at all answer the question of what is an original form to begin with.

792 F.2d at 175 n.6 (Pet. App. 83a n.6) (emphasis in original).

gress contemplated that deletion of identifying data and segregation and release of the remaining non-identifying material which is mandated by FOIA would satisfy the Haskell Amendment. The failure of the court of appeals to perceive this is difficult to understand, especially since a panel of the same court simultaneously ruled that § 6103 is a FOIA (b)(3) exemption statute.

The duty to delete exempt information and to segregate and release the remainder of a document is found in the Freedom of Information Act, 5 U.S.C. § 552(b). 26 U.S.C. § 6103(b)(2), is, as a statute which limits disclosure, an "exemption statute" under 5 U.S.C. § 552(b)(3).[21] The two statutes function together in the following manner: 26 U.S.C. § 6103 defines the limitations on disclosure to which the IRS must adhere; FOIA then sets forth the procedures for disclosing that information which is disclosable (*i.e.*, which falls outside the limitation of § 6103). Among the relevant FOIA procedures is the obligation to delete exempt materials, and segregate and disclose parts of documents which contain only non-exempt information. 5 U.S.C. § 552(b). FOIA also provides the standards for reviewing denials of disclosure. 5 U.S.C. § 552(a)(4)(B).[22]

[21] 5 U.S.C. § 552(b)(3) provides in relevant part that FOIA does not apply to matters that are

> specifically exempted from disclosure by statute . . . provided that such statute . . . establishes particular criteria for withholding or refers to particular types of matters to be withheld.

The IRS did not cross-petition from the court of appeals' ruling that 26 U.S.C. § 6103(b)(2) is a § 552(b)(3) exemption statute.

[22] Following a list of nine exemptions, 5 U.S.C. § 552(b) requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." The cases applying FOIA's obligation to delete and segregate to (b)(3) exemption statutes are legion. *See, e.g., Britt* v. *IRS*, 547 F.Supp. 808 (D.D.C. 1982) (redaction of identifying portions of § 6103

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Although the court of appeals panel found FOIA and § 6103 to be "entirely harmonious," 792 F.2d at 149 (Pet. App. 30a), the *en banc* majority implicitly rejected FOIA's deletion approach. Instead it read into the words "in a form" a requirement that the information in IRS files be manipulated or transmuted in some unspecified way other than redaction, a reading which is completely unsupported by the language of the Haskell Amendment. Under the court's reformulation test, not only would entire documents be withheld which would ordinarily be released under FOIA with identifying data deleted, but, in addition, documents which in their original state contain no identifying material whatsoever would be withheld solely because they had not been reformulated. This extraordinary and complex meaning simply cannot be found in the common words "in a form," especially because a simpler definition which is more consistent with FOIA exists. The *en banc* majority's approach violates the "fundamental canon of statutory construction" that "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin* v. *United States*, 444 U.S. 37, 42 (1979); *Burns* v. *Alcala*, 420 U.S. 575, 580-81 (1975).[23] By finding in the ordinary words "in a form" a requirement to reformulate or recreate documents, the court imposed an esoteric, technical meaning on the words that departs from their common meaning.

The IRS had argued below for a reading of the Haskell Amendment even more restrictive than the court's re-

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tax return information); *Goland* v. *CIA*, 607 F.2d 339 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 927 (1980) (redaction of intelligence sources and methods under 50 U.S.C. § 403(d)(3) and (g)); *Ray* v. *Turner*, 587 F.2d 1187 (D.C. Cir. 1978) (same); *Irons* v. *Gottschalk*, 548 F.2d 992 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 965 (1977) (redaction of identifying information in patent manuscript decisions under 35 U.S.C. § 122).

[23] This rule has been specifically applied to the Internal Revenue Code. *Commissioner* v. *Brown*, 380 U.S. 563, 571 (1965).

formulation test. It argued that the Haskell Amendment limits disclosure to information from which all identifying data has been removed, and which has further been reduced to a statistical tabulation and amalgamated in some fashion so that it has completely lost all traces of the original data. The IRS did not make a serious effort to reconcile the plain language of the statute with its position that statistical amalgamation is required before information loses its character as return information,[24] and the court of appeals found "absolutely no textual basis" for such a limited reading of the phrase "in a form." 792 F.2d at 161 (Pet. App. 52a). Instead, the *en banc* majority substituted its own interpretation of the phrase "in a form" to require a "reformulation" of some unspecified nature, which would include, but not be limited to, amalgamation.

There is no more basis for reading reformulation into the statutory language than there is for amalgamation. Contrary to the majority's view in the court of appeals, the use of the phrase "in a form" does not, by itself or in the context that it appears in the statute,[25] carry with it any suggestion that Congress envisioned a form different from that in which the document originally appeared, ex-

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[24] Indeed, the IRS had previously recognized that the plain language of the Haskell Amendment supported the court's interpretation in *Long*. In its Petition for Certiorari in *Long* v. *IRS*, No. 79-1269 (Oct. Term, 1979), at p. 13, the IRS stated:

> Although we continue to believe that our interpretation of the Haskell Amendment is correct and supported by legislative history of the most authoritative character, we do not ask this Court now to review the court of appeals' adherence to *the literal language* of that provision and its rejection of the applicability of Exemption 3 to the TCMP source documents.

(Emphasis supplied.)

[25] The court of appeals attempted to support its decision with reference to what it perceived as inconsistencies and redundancies with other sections of the statute which occurred under the Church's interpretation. These are answered *infra* at Point III.

cept for deletions made in accordance with FOIA. Indeed, as the dissent noted, "Congress could hardly have embarked on a more oblique route if its goal was to create such a separate [reformulation] requirement." 792 F.2d at 175 (Pet. App. 82a).

The plain meaning of the statute clearly supports the Church's position that return information from which identifying data has been deleted loses its status as return information under § 6103(b)(2), and is disclosable upon request under FOIA.

POINT II

The Legislative History Of 26 U.S.C. § 6103 And The Haskell Amendment Support Petitioner's Position That The Statute Requires Disclosure Of Information To The General Public Which Does Not Identify Any Particular Taxpayer.

The plain meaning of the Haskell Amendment, as described above, draws support from its legislative history. The principle of statutory construction that a statute "should be interpreted so that its manifested purpose or object can be accomplished," Sutherland, *Statutes and Statutory Construction* § 58.06 (4th ed. C.D. Sands, 1984 rev.) is furthered by the Church's interpretation of the statute. Neither the court of appeals' reformulation test nor the IRS' position below that only statistical amalgamation can be disclosed, is reflective of the evident legislative purpose.

Section 6103 was revised as part of the Tax Reform Act of 1976. The purpose of the revision of § 6103 was to protect individuals' tax returns and tax return information from governmental abuse, specifically the wholesale disclosure of confidential information by the IRS to *other government agencies*, for improper and politically partisan

objectives. The revision was a response to revelations that the White House, various executive branch agencies, and other government entities were receiving confidential tax information to which they had no legitimate claim, and using it for clearly improper purposes. *Chamberlain* v. *Kurtz*, 589 F.2d 827, 835 (5th Cir.), *cert. denied*, 444 U.S. 842 (1979); *American Friends Service Committee* v. *Webster*, 720 F.2d 29, 70 (D.C. Cir. 1983).[26]

This concern with preventing improper disclosure of tax information identifying particular taxpayers to other branches of the government was the sole focus of Congress through most of the consideration of § 6103. It was only near the conclusion of the process, through the introduction of the Haskell Amendment on the floor of the Senate, that any consideration was given to the effect that the revision of § 6103 would have on the disclosure of non-

[26] The abuses which were prevalent in the period immediately preceding passage of the Tax Reform Act of 1976 are detailed in the *Final Report of Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans, Book III*, 94th Cong., 2d Sess. (1976) (popularly known as the "Church Committee Report"). Among the illegal activities documented in the Church Committee Report were the "unrestrained, unfocused intelligence gathering and . . . targeting of groups for intelligence collection on bases having little relationship to enforcement of the tax laws." *Id.* at 897. Thousands of individuals and groups, including petitioner, were the targets of this unauthorized information-gathering. *Id.* at 897, 909. The IRS widely distributed the information thus collected throughout the government; its unrestrained activity in this regard caused it to be characterized as a virtual "lending library of confidential tax information" to other government agencies. 112 Cong. Rec. 24013, Remarks of Senator Weicker. This history is reflected in the legislative history of § 6103. *See, e.g.*, S.Rep. No. 938, 94th Cong., 2d Sess. 315 (1976), *reprinted in* [1976] *U.S. Code Cong. & Ad. News* 3439, 3744, noting that there had been much abuse in the area of tax returns. The legislative history reveals concerns about disclosure of tax information on identified individuals to the White House, *id.* at 3746, and to other federal and state agencies, *id.* at 3747.

identifying tax return information to the general public pursuant to the Freedom of Information Act.

The court of appeals' majority characterized the Church's view of the Haskell Amendment as a "fundamental change in the committee proposal," 792 F.2d at 160 (Pet. App. 50a), and concluded that it was impossible that such a change would have occurred without more study and discussion by Congress. *Id.* This view was possible only because the *en banc* majority completely divorced the statute from its legislative purpose, failing to discuss anywhere in its opinion the fact that the purpose of § 6103 was to protect taxpayers from unauthorized disclosures of their confidential tax information to branches of government having no legitimate basis for obtaining access to it. Viewed against the greater statutory objectives, the Haskell Amendment did not introduce a fundamental change in the statutory scheme, but merely ensured the continued disclosure of non-identifying information to the general public. Permitting such disclosure is in no way inconsistent with the overall statutory purpose, and, indeed, by limiting disclosure to non-identifying information, it is wholly consistent with the rest of § 6103.

Introducing the Haskell Amendment, Senator Haskell addressed whether the IRS would be able to avoid its previously-existing obligation to disclose a statistical study simply by adding information to that study which might identify a particular taxpayer. He stated:

> [t]he purpose of this amendment is to insure that statistical studies and other compilations of data now prepared by the Internal Revenue Service and disclosed by it to outside parties will continue to be subject to disclosure to the extent allowed under present law. Thus the Internal Revenue Service can continue to release for research purposes statistical studies and compilations of data, such as the tax model, which do not identify individual taxpayers.

> The definition of 'return information' was intended to neither enhance nor diminish access now obtainable under the Freedom of Information Act to statistical studies and compilations of data by the Internal Revenue Service. Thus, the addition by the Internal Revenue Service of easily deletable identifying information to the type of statistical study or compilation of data which, under its current practice, has been subject to disclosure, will not prevent disclosure of such study or compilation under the newly amended section 6103. In such an instance, the identifying information would be deleted and disclosure of the statistical study or compilation of data be made.

122 Cong. Rec. 24,012 (1976). The Senate passed the Amendment and the Conference Committee approved it. The committee's report, S. Rep. No. 1236, 94th Cong., 2d Sess., stated at 475-76:

> The Senate amendment provides that returns and return information are to be confidential and not subject to disclosure except as specifically provided by statute. . . . Under the amendment, data in a form that cannot be associated with or otherwise identify a particular taxpayer will not constitute return information.

This legislative history supports the Church's position that disclosure to the general public of information which could not lead to the identification of any taxpayer was what Congress intended.

Senator Haskell's reference to the tax model in his comments introducing the Amendment is particularly helpful in understanding its intended purpose. The tax model was, at the time the Haskell Amendment was offered on the floor, a compilation of raw data from actual tax returns, from which identifying data had been deleted. The information was not changed in any other way; it was

neither "reformulated" nor "amalgamated." Thus, Senator Haskell's comment that the Amendment was intended to ensure continued release of documents such as the tax model "which do not identify individual taxpayers" is entirely consistent with the interpretation of the Amendment advocated by the Church herein.

At the time the *en banc* court of appeals considered the Haskell Amendment issue, the court erroneously believed that the tax model was in fact a reformulated document. Indeed, the *en banc* majority originally described it as such.[27] Having such a mistaken understanding, the majority likely read the legislative history as offering some support for its reformulation theory.[28] Once the court was advised of the true nature of the tax model, however, any basis for support for the reformulation theory in the legislative history vanished.

Nevertheless, the court did not revise its holding. In amending its decision, the majority asserted that the sole basis for its reference to the tax model in the first instance was to refute the government's amalgamation theory, and disclaimed any reliance on its mistaken view of the nature of the tax model to support its reformulation view. 792 F.2d at 162 n.3 (Pet. App. 91a). It was precisely because

[27] The *en banc* decision initially described the tax model as "a sample return, derived from an actual return but reformulated to substitute new figures for certain items—a partly actual, partly fictional return, so to speak." (Pet. App. 54a). This misperception by the court was based upon an incorrect description of the tax model by the IRS' counsel at oral argument before the *en banc* court. 792 F.2d at 162 n.3 (Pet. App. 91a); (J.A. 82a-83a). The nature of the tax model apparently changed, after 1980, to include fictionalized data. 792 F.2d at 162 and n.3 (Pet. App. 90a-91a). The subsequent change has no bearing on Senator Haskell's statement of the purpose of the Haskell Amendment, which concerned the tax model as it existed at the time of the Amendment's passage.

[28] As the majority opinion points out, however, the legislative history offers *no* support for the IRS' amalgamation theory. 792 F.2d at 161-62 (Pet. App. 52a-54a).

the tax model was not an amalgamated document, however, that the majority had used it to refute the government's position. In its original opinion, the court had noted that the IRS was unable to reconcile its theory—that only statistical compilations were disclosable—with "the embarrassing fact . . . that the tax model is not a statistical study or compilation." 792 F.2d at 162 n.4 (Pet. App. 54a n.3). By the same token, the majority's requirement of a reformulation is undercut by the equally "embarrassing fact" that the stated purpose of the Haskell Amendment was to allow public access to non-reformulated documents such as the tax model. The majority's continued adherence to the reformulation requirement in view of its concession that the tax model itself is not reformulated is inexplicable.[29]

Subsequent legislative action and comment also support the Church's position that non-identifying information must be disclosed. Section 6103 was again amended in 1981 as part of the Economic Recovery Tax Act of 1981. Although the substance of the particular amendment itself is not germane to this case, the congressional process and legislative history support the Church's position here.

[29] This incongruity between reasoning and outcome caused the dissent to comment:

> Given this acknowledgement of its mistaken factual assumption, I am amazed that the majority continues to claim that redaction is insufficient under the Haskell Amendment. After having relied in the original opinion on the tax model to refute the government's suggestion that *aggregation* is required, the majority stubbornly refuses now to examine the effect that the newly discovered definition of the then existing tax model has on its own standard of *reformulation*. The correct description of the tax model at the time of passage definitively demonstrates that both the interpretations advanced by the government and the majority are wrong, and that all that the framers of the Amendment thought necessary under § 6103 was effective redaction.

792 F.2d at 176 n.7 (Pet. App. 92a).

Following decisions in *Long* v. *IRS*, 596 F.2d 362 (9th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980), and *Long* v. *Bureau of Economic Analysis*, 646 F.2d 1310 (9th Cir. 1981), which held, as the Church urges here, that the Haskell Amendment permits release of non-identifying information pursuant to FOIA, Congress added an additional sentence to § 6103(b)(2)[30] to prohibit disclosure of certain information regarding audit criteria which the IRS maintained would be disclosable under the *Long* decision. Congress evidenced complete familiarity with the Ninth Circuit's rationale in the two *Long* cases, specifically reciting in the legislative history that court's analysis. *Report of the House Committee on Ways and Means on Tax Incentive Act of 1981*, H.R. Rep. No. 201, 97th Cong., 1st Sess. (Comm. Print 1981) at 238 n.2. After discussing the *Long* decisions, Congress stated unequivocally that "the committee intends that *nothing* in this provision *be construed to limit disclosure of statistical data or other information* [other than audit criteria] *to the extent permitted under present law. Thus, any information that is currently made available will continue to be available.*" *Id.* at 239 (emphasis supplied).[31]

Clearly, had Congress thought that the *Long* decisions had wrongly interpreted the Haskell Amendment, it would have so stated. Instead, Congress' sole concern was to exclude audit criteria from public disclosure. H.R. Rep. No. 201, *supra* at 239. Aside from this single exception, Congress approved the *Long* rationale.

This subsequent history strongly supports the Church's position on the proper interpretation of the Haskell Amendment. "[W]here . . . Congress adopts a new law incorporating sections of a prior law, Congress normally

[30] 95 Stat. 340 (1981).

[31] The only other circuit court of appeals which had ruled upon the meaning of the Haskell Amendment at that time had adopted the *Long* rationale. *Neufeld* v. *IRS*, 646 F.2d 661 (D.C. Cir. 1981).

can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978). *See also Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 381-82 (1982). The presumption of congressional knowledge rises here to a certainty, for the Congressional Report reflects Congress' conscious attention to the prior judicial interpretation of the Haskell Amendment, which had direct bearing on the course of action it undertook.

This case is thus like *Lindahl* v. *Office of Personnel Management*, 470 U.S. 768 (1985), where similar evidence of congressional consciousness was dispositive of the issue of the proper interpretation of the statute. In *Lindahl*, the fact that Congress explicitly considered the existing law and did not act to reverse it was sufficient to show Congress' intent that it remain viable. Here, the case is even stronger, as Congress expressly declared its intention to maintain current interpretations of the Haskell Amendment (*i.e.*, as set forth in *Long* and *Neufeld*).

The Church's interpretation of the Haskell Amendment is also borne out by the fact that the IRS itself repeatedly interpreted it in the manner advocated by the Church here. Such contemporaneous construction by an agency has persuasive weight on the question of a statute's meaning, even if the agency later changes its position. *Watt* v. *Alaska*, 451 U.S. 259, 272-73 (1981); *see also Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). On March 1, 1977, shortly after the effective date of the Tax Reform Act, which incorporated the language of § 6103(b)(2) at issue here, Acting IRS Commissioner William E. Williams was questioned by a congressional subcommittee regarding IRS plans to disclose inquiries made to the IRS by members of Congress on behalf of their constituents. Commissioner Williams, IRS counsel, and an assistant IRS commissioner testified that FOIA compelled such disclosure with the

names of the individual taxpayers and other identifying data deleted. *Hearings Before the Treasury, Postal Service, and Government Appropriations Subcommittee of the House Committee on Appropriations*, 95th Cong., 1st Sess. 442-46 (March 1, 1977).

Moreover, at the outset of *this very case*, in reviewing a limited category of documents responsive to petitioner's request, the IRS deleted information which identified third parties, claimed a § 6103(b)(2) exemption as to those particular provisions of the documents which were withheld, and released the remaining portions of the documents; *i.e.*, it followed the precise procedures which the Church advocates and which the court of appeals found that § 6103 (b)(2) forbids. *See* IRS Memorandum for Reviewers (J.A. 44a-45a); Letter from IRS to Rev. James Morrow (J.A. 56a). The IRS' treatment of these documents is very significant because these deletions preceded the decision in *Neufeld* v. *IRS*, 646 F.2d 661 (D.C. Cir. 1981). Thus the IRS, acting without compulsion of a judicial mandate, interpreted the Haskell Amendment in the very manner which the Church urges here.

In sum, the legislative history and the IRS' own prior interpretations of the Haskell Amendment support the Church's position.

POINT III

Nothing In The Structure Of The Statute Compels The Withholding Of Non-Identifying Information From Disclosure, And The Court Of Appeals Erred In So Holding.

The *en banc* majority sought support for its position in a textual analysis of § 6103 and the surrounding statutes. The court noted that the *Long* identity test resulted in certain superfluous language, and concluded from this that Congress could not have intended to allow release of non-identifying information. Instead, the court substituted its own reformulation test, which as the majority conceded, also results in superfluities. 792 F.2d at 163 (Pet. App. 57a). The court of appeals' textual analysis is ultimately unconvincing because the court inflated the significance of some superfluities, and was flatly wrong about others. It further fails to give meaning to all the words of the statute.

Although the last-minute addition of the Haskell Amendment did cause some small portion of the already-drafted language of the statute to become superfluous, it is fully consistent in content with the language and purpose of the statute. It is readily explained by the legislative history of the Haskell Amendment, and particularly by the fact that the Haskell Amendment was enacted after the main body of the legislation, which was concerned solely with preventing further unauthorized disclosures of IRS data about named individual taxpayers within the government, had been drafted. The superfluities which occur under the Church's reading of the statute, then, are explainable by the fortuities of the legislative process, and fully consistent with the statutory scheme and purpose.

None of the specific claims of superfluity made by the court of appeals, either alone or in combination with others, supports an interpretation of the Haskell Amendment

other than that proposed by the Church. Certainly, none gives support to the court of appeals' reformulation test.

The *en banc* majority asserted that the Church's interpretation fails to give meaning to the words "in a form." 792 F.2d at 157 (Pet. App. 45a). As noted by the dissent, these words serve as a linguistic aid and carry the clear and commonsense meaning of "in a manner" or "in a way." Thus, even read alone, they serve a purpose in the Haskell Amendment. When read in conjunction with FOIA, moreover, the meaning is even clearer. For, under FOIA's deletion and segregation requirement, the "form" referred to is the form the document has been put into by the deletion of exempt material.

It is the majority's analysis which fails to give meaning to all the words of the statute, for it ignores the word "data" which precedes the phrase "in a form." The word "data" appears not only in the Haskell Amendment, but also in the definition of return information which immediately precedes it. There, return information is defined as a variety of specifically enumerated items, and "any other *data* received by . . ." the IRS with respect to a return or tax liability. § 6103(b)(2)(A) (emphasis supplied). It is clear from the context that the word "data" is used to mean, simply, "information," and includes all information concerning tax returns or tax liability which the IRS may receive, from whatever source and in whatever form. The word "data" is then immediately reiterated in the Haskell Amendment, which appears at the end of the definitional section, where it carries the same meaning. Under the majority's interpretation of the Haskell Amendment, however, since deletion and release of segregable portions of documents would never be sufficient to constitute a reformulation, mere "data" would never be disclosed. Only reformulated whole documents would be released. Under the Church's interpretation, however, segregable parts of documents ("data") would be released once all identifying information had been removed, as long as

there was sufficient segregable data to be intelligible. *Mead Data Central, Inc.* v. *United States Department of the Air Force*, 566 F.2d 242, 261 n.55 (D.C. Cir. 1977); *Yeager* v. *Drug Enforcement Administration*, 678 F.2d 315, 322 and n.16 (D.C. Cir. 1982). This result is more consistent with the statutory language, as it gives a function to the word "data."

A second textual complaint by the court of appeals is that § 6103(b)(2)(A) details the type of information which constitutes return information while "leaving to an afterthought" the fact that non-identifying data is excluded from this definition. 792 F.2d at 157 (Pet. App. 43a-44a). There is in fact no incongruity at all. The definition in subsection (A) is suffused with concern about protecting the identity of the taxpayer. The entire list of items exempted from disclosure is described in terms relating to the individual taxpayer whose identity might be disclosed —"*his* income;" "whether *the taxpayer's* return was . . . examined;" "the existence of liability *of any person*." 26 U.S.C. § 6103(b)(2)(A) (emphasis supplied). Every item on the list of data constituting return information contained in subsection (A) is explicitly concerned with the individual's identity. Thus, there is no inconsistency, as the court of appeals suggested, between the definitional language of § 6103(b)(2)(A) and the Haskell Amendment which follows it. The Haskell Amendment merely makes explicit that which is implicit in the definitional section—that disclosure of *identifying* information is the evil against which the statute is directed.

The *en banc* majority also made the structure of § 6103(f), which deals with release of tax return information to Congress, a focal point of its textual argument. 792 F.2d at 158 (Pet. App. 45a-46a). Section 6103(f) requires Congress to sit in closed session if it is considering return information which can identify a particular taxpayer. The crux of the court of appeals' position is that if return information is synonymous with identifying information, the

wording relating to identification is superfluous.[32] While this is technically true, it is of absolutely no moment, since the direction to Congress—to review identifying information only in closed session—remains unchanged. Moreover, this superfluity, like the others relied upon by the *en banc* majority, is fully explainable by the legislative process which occurred here, with the Haskell Amendment being appended to an otherwise fully-drafted statute. Since there was no redrafting necessary to effectuate Congress' intent, none was undertaken.[33]

The *en banc* majority also erred in its assumption that the Comptroller General and other governmental agencies subject to § 6103(i)(7)(A) and § 6103(j)(4) disclosure limitations only release reformulated statistical compilations to the public. 792 F.2d at 160-61 (Pet. App. 51a-52a). The

[32] Section 6103(f) has four subsections dealing with different Congressional entities which might receive information from the IRS. Section 6103(f)(1) deals with disclosures to the Committee on Ways and Means, Committee on Finance, and Joint Committee on Taxation; § 6103(f)(2) with disclosures to the Chief of Staff of the Joint Committee on Taxation; § 6103(f)(4)(A) with disclosures by these Committees to the Senate or House of Representatives; and § 6103(f)(4)(B) deals with disclosures to other committees of the Senate or House. Each subsection provides, in identical language, that disclosure of identifying tax return information must be made in closed session. It is a measure of the sparsity of textual support for its position that the *en banc* majority inflates this into four separate claims of superfluity. *See* dissenting opinion, 792 F.2d at 176 n.8 (Pet. App. 85a n.7).

[33] The *en banc* majority similarly made much of the fact that portions of § 6103(b)(2)(B), which includes within the definition of return information portions of written determinations by the IRS and related background files, are rendered superfluous under the Church's interpretation. 792 F.2d at 157 (Pet. App. 44a-45a). The majority suggests that there is no purpose served by the inclusion of specific types of information (in addition to the general category of identifying information) in the definition of excludable information, if, under the Haskell Amendment, all non-identifying information is disclosable. Again, as there is nothing in this provision which is functionally affected by the Church's interpretation of the Haskell Amendment, the superfluity is purely an excess of language, and redrafting was unnecessary.

majority thought that this was significant because these subsections also use the words "in a form" [34] and the majority argued from this that Congress intended the words "in a form" to require reformulation. The majority was wrong in its premise. As shown by the Comptroller General's Report No. GGD 79-59 "IRS Audits of Individual Taxpayers and Its Audit Control System Need to be Better" (1979), in which the Comptroller General released actual tax return data with identifying information deleted, the Comptroller General (and presumably other agencies who are subject to the "in a form" language of § 6103(i) and (j)), discloses actual, unreformulated tax return information to the public after deleting identifying data.

The *en banc* majority also considered the Church's view of § 6103(b)(2) incompatible with 26 U.S.C. § 6110. 792 F.2d at 159 (Pet. App. 48a). That section makes written determinations—which were previously completely barred from disclosure—open to the public under circumstances which protect the identify of the taxpayers who are the subjects of the determinations. The identity of the subject of the written determination is also disclosable, but only after the taxpayer is given advance notice, and the opportunity, through administrative and judicial proceedings, to prevent disclosure of his identity.

The majority construed § 6110 as incompatible with the Church's interpretation of the Haskell Amendment, since it viewed the information with which § 6103(b)(2) is concerned as inherently more private than identifying information in written determinations. *Id.* Even if this were

[34] Section 6103(i)(7)(A) provides that:

> No such officer or employee shall . . . disclose to any person . . . any return or return information . . . *in a form* which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer . . . .

(Emphasis supplied.) Section 6103(j)(4) employs similar language.

true,[35] the statutory scheme provides *more* protection to taxpayers' identity under § 6103 than under § 6110, thus rendering the majority's point meaningless. Under the Church's analysis of § 6103, that statute's bar on disclosure of identifying information is absolute. Any identifying information—whether it identifies the taxpayer directly or indirectly—is defined as return information which is categorically nondisclosable. In contrast, § 6110 *permits* disclosure of identifying information under certain circumstances. The procedural protections offered by § 6110, which the court of appeals extolls, are available to the taxpayer only when the IRS has determined to release his name and other identifying information about him.[36]

A fundamental weakness of the court's emphasis on these minor superfluities in the statutory language is the fact that its own interpretation of the Haskell Amendment results in superfluous language as well, as the majority itself concedes. 792 F.2d at 163 (Pet. App. 57a). Ultimately, any

[35] Written determinations are not necessarily less private than return information. Written determinations are often requested by taxpayers whose personal or business decisions are contingent upon the outcome of a request for a written determination. H.R. Rep. No. 658, 94th Cong., 2nd Sess. 319 (1976) *reprinted in* [1976] *U.S. Code Cong. & Ad. News* 2897, 3215. Congress' concern with the privacy of such determinations is clear from the statutory disclosure scheme in effect prior to the Tax Reform Act of 1976, under which written determinations were entirely barred from disclosure. H.R. Rep., *supra* at 314, [1976] *U.S. Code Cong. & Ad. News supra* at 3210. Although Congress saw fit to allow disclosure of written determinations for the first time in the Tax Reform Act of 1976, it maintained concern about the release of identifying information, and took steps to protect it. In this light, it is notable that Congress thought deletion of identifying information from written decisions was sufficient to protect taxpayers' interests.

[36] The dissent also notes quite correctly that any complaint about the inadequacies of procedural protections for accidental disclosures of identity from deleted material apply as fully to reformulated as to non-reformulated documents under § 6103, and thus comparison with the procedural protections of § 6110 does not advance the majority's argument. 792 F.2d at 178 n.9 (Pet. App. 88a n.8).

reading of the Amendment entails some analytically insignificant superfluous language—a phenomenon undoubtedly created by the last-minute nature of the Amendment. The very universality of the phenomenon militates against reading any undue meaning into it. It certainly does not support the full weight of the statutory interpretation with which the court below imbued it.

A close reading of § 6103(b)(2), both alone and in the context of the provisions which surround it, clearly supports the Church's position that the Haskell Amendment was intended to permit the disclosure of information from which all identifying information has been deleted.

POINT IV

Policy Considerations Underlying The Freedom Of Information Act Favor Full Disclosure Of Non-Identifying Information.

The court of appeals' interpretation of the Haskell Amendment effectively immunizes the IRS from most FOIA requests, without any evidence that Congress intended such a result, and contrary to the congressional intent as expressed both in the Haskell Amendment itself and in the Freedom of Information Act.

As we have shown, Congress' concern in revising § 6103 was primarily to prevent the IRS from making further improper disclosures of tax return information about identified individuals to other government agencies. *Supra* at Point II. Such intragovernmental disclosures were improper and harmful precisely because they identified individuals; had identifying data been deleted, this remedial legislation would not have been necessary. The public interest which Congress was addressing in § 6103 is fully protected by maintaining confidentiality of identifying tax return information.

The decision of the court of appeals not only is unsupported by the language and legislative history of § 6103, but also undermines the purpose of the Freedom of Information Act. Although the majority decision acknowledges FOIA's relevance here, correctly recognizing that § 6103 is a FOIA (b)(3) exemption statute, its adoption of a reformulation test operates, as a practical matter, to significantly shield the IRS from having to make any disclosures under FOIA,[37] in derogation of that statute's clear purpose. For only under the Church's interpretation of the Haskell Amendment do FOIA's procedures for deletion of segregable portions of documents pertain. 5 U.S.C. § 552(b); *Department of the Air Force* v. *Rose*, 425 U.S. 352 (1976). Under the court of appeals' reformulation test, however, there is no concomitant obligation. FOIA does not require agencies to reformulate data or construct new documents as a prerequisite to disclosure. *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975). Thus, FOIA requestors would only receive information which the IRS had, for reasons of its own, already reformulated for some other purpose.[38]

The decision thus not only undercuts the policy interests which § 6103 was drafted to further, but it undercuts the policy interests protected by FOIA as well. FOIA's man-

[37] As the IRS noted in its brief in response to the Church's petition for certiorari at 8 n.*:

> The proceedings on remand, in particular the submission of affidavits and indices by the IRS to justify the failure to disclose documents, are largely directed to the determination whether certain documents constitute 'return information' within the meaning of Section 6103 as interpreted by the court of appeals en banc. The remand proceedings would be conducted quite differently if the majority's interpretation of the Haskell Amendment were reversed by this Court.

[38] The effect would be particularly limiting because of the tendency of the IRS to interpret return information broadly. At oral argument before the *en banc* court of appeals, counsel for

(footnote continued on following page)

date is to further openness in government and to lift the veil of secrecy behind which government agencies previously functioned. Its objective is to allow the fullest possible disclosure to the public within the confines of protecting legitimate interests against such disclosure. As this Court stated in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73 (1973):

> Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.
>
> • • •
>
> As the Senate Committee explained, it was not 'an easy task to balance the opposing interests, but it is not an impossible one either. . . . Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.' S. Rep.No. 813, p. 3.

410 U.S. at 80 (footnote omitted). Further, FOIA was designed to maximize the release of nonexempt information through the process of deletion of exempt data and release of segregable portions of documents which are free of exempt data. "The focus of the FOIA is information, not

(footnote continued from previous page)

the IRS argued, for example, that a sheet of figures without any identifying data whatsoever from a taxpayer's file would be return information. (J.A. 87a-89a.) Indeed, he could not think of any documents in IRS files which the government would not classify as return documents except two—the tax model and a compilation of income statistics. (J.A. 90a.) *See also, e.g., Tax Analysts & Advocates* v. *IRS*, 505 F.2d 350 (D.C. Cir. 1974) (court rejects IRS position that letter rulings and technical advice memoranda are return information); *Fruehauf Corp.* v. *IRS*, 566 F.2d 574 (6th Cir. 1977) (court rejects IRS position that background files of published revenue rulings are return information).

documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material." *Mead Data Central, Inc.* v. *United States Department of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

The *en banc* majority justified its reformulation test by asserting that privacy interests could not otherwise be protected, and that the possibility of unauthorized disclosure of private tax return information stemming from inadequate protections would compromise voluntary tax compliance. 792 F.2d at 158-59 (Pet. App. 46a-47a). These concerns are unwarranted.

The privacy of individuals is fully protected by the Church's interpretation of the Haskell Amendment. The Amendment broadly defines identifying information to exclude any data that can be associated with or directly or indirectly identify an individual. The IRS has the knowledge and expertise to determine what material would tend to identify a taxpayer. Indeed, the IRS has, for years, made precisely such deletions in response to FOIA requests.[39] The courts similarly are well-positioned to determine whether a deletion is consonant with the statutory language. This is the business of courts, and they are experienced in performing it under FOIA's *de novo* review procedure. *See, e.g., Moody* v. *IRS*, 654 F.2d 795 (D.C. Cir. 1981); *Church of Scientology of California* v. *United States Department of the Army*, 611 F.2d 738 (9th Cir. 1979).

[39] *Long* was decided in 1979 and *Neufeld* in 1981. The IRS thus has had years of experience with respect to FOIA requests originating in these circuits in making the appropriate deletions of identifying materials. It did so in this very case with respect to certain documents, and continues to do so in other cases. It has formulated specific regulations for its personnel directing them how to make appropriate deletions. *See Internal Revenue Manual Admin. Pt. I, Disclosure of Official Information Handbook*, MT 1272-149, § 13(52) (Comm. Clearing House ed. 1985) at 2287-56 to 2287-57. This accords with all agencies' obligations under FOIA.

The *en banc* majority expressed concern that an "informed requestor" might already possess some knowledge which, when combined with seemingly innocuous information released by the IRS, would enable him to identify a taxpayer. 792 F.2d at 158 (46a-47a). But weighing the possibilities of an informed requestor is an appropriate agency and judicial function which is routinely performed in determining whether information is exempt from disclosure, as this Court recognized in *Department of the Air Force* v. *Rose*, 425 U.S at 379-80.

The assertion by the court of appeals that § 6103 evidences a *heightened* concern with disclosures to the public, above and beyond that of FOIA, is simply not supported by the language of the statute nor the legislative history. Congress is fully capable of articulating heightened concerns against disclosure, and has done so repeatedly where policy concerns militated against disclosure. *See, e.g.*, 68 Stat. 1013, 13 U.S.C. §§ 8, 9 (restricting access to Census Bureau data); 61 Stat. 497, 50 U.S.C. § 403(d)(3) (protecting intelligence sources and methods from unauthorized disclosure). No such unusual concern was demonstrated here.

The court of appeals' reliance on *Baldrige* v. *Shapiro*, 455 U.S. 345 (1982) to support its claim of heightened concern is particularly inapt. In *Baldrige*, city and state officials were denied access to raw census data, which they had requested despite the fact that the applicable statute, 13 U.S.C. § 9, specifically prohibited disclosure of such data. 456 U.S. at 356. The statute had, since 1929, stated the prohibition on disclosure plainly; in 1976, Congress strengthened the prohibition, specifically barring disclosure to public entities such as petitioners. *Id.* at 358. Subsequent legislative history underlined the Congressional intent. *Id.* This is a far cry from the situation in this case, where the statute does not explicitly or implicitly suggest that any heightened concern with disclosure of non-identifying information to the public is warranted, and the legis-

lative history clearly demonstrates that Congress was concerned with an entirely different problem.

Nor was the court of appeals persuasive in its assertion that a reformulation requirement was necessary to insure voluntary compliance with the tax laws. Clearly, the primary motivation in tax evasion is a financial one. The civil and criminal penalties for failure to comply with income reporting requirements are logically the major influence on individuals' decisions whether or not to comply.

Reading a reformulation requirement into § 6103(b)(2) would not serve the public policy objectives which Congress specifically chose to further in § 6103 and in the Freedom of Information Act; indeed, it would be detrimental to those interests and should not be condoned by the Court.

By creating a test which does more than necessary to protect the legitimate interest against invasions of individual taxpayers' privacy, the court of appeals unjustifiably curtails disclosure, violating this Court's directive that "the policy of [FOIA] requires that the disclosure requirements be construed broadly, the exemptions narrowly." *Department of the Air Force* v. *Rose*, 425 U.S. at 366.

Application of the *Rose* directive is particularly appropriate here, where the Church's FOIA request was a response to improper IRS information gathering. A similar set of circumstances is found in *McSurely* v. *McAdams*, 502 F. Supp. 52 (D.D.C. 1980), where plaintiffs in a civil suit alleging government misconduct subpoenaed from the IRS certain third party files which they believed would show the extent to which documents unlawfully seized from them had been improperly disseminated throughout the government. The IRS claimed in that case, as here, that § 6103 barred disclosure. The court rejected the claim, finding that the legislative history showed that Congress, in enacting § 6103, was concerned with misuse of tax information within the government for partisan political purposes, and that the plaintiffs' interest in identifying

past government abuse "complements, rather than contradicts, the prime rationale behind § 6103." 502 F. Supp. at 56.

It would be ironic indeed if the IRS were able to use the statute which had been drafted to end improper activities against taxpayers, as a shield against just such taxpayers who had been victimized by this conduct, and who sought disclosure through FOIA requests. Through the Haskell Amendment, Congress sought to prevent use of the salutory new provisions of § 6103 to justify the withholding of non-identifying information from FOIA requestors.

CONCLUSION

The judgment of the court of appeals incorporating the *en banc* opinion of the court of appeals should be reversed for the reasons stated herein. The case should be remanded to the court of appeals for further proceedings consistent with the construction of the Haskell Amendment urged herein.

Dated: April 27, 1987

Respectfully submitted,

MICHAEL LEE HERTZBERG
275 Madison Avenue
New York, New York 10016
(212) 679-1167

ERIC M. LIEBERMAN
ELLEN J. WINNER
RABINOWITZ, BOUDIN, STANDARD,
KRINSKY & LIEBERMAN, P.C.
740 Broadway, 5th Floor
New York, New York 10003
(212) 254-1111

KENDRICK L. MOXON
Of Counsel

APPENDIX

APPENDIX

Additional portions of 26 U.S.C. § 6103 referred to by the court of appeals are reproduced herein.

(f) *Disclosure to Committees of Congress.*—

(1) *Committee on Ways and Means, Committe on Finance, and Joint Committee on Taxation.*—Upon written request from the chairman of the Committee on Ways and Means of the House of Representatives, the chairman of the Committee on Finance of the Senate, or the chairman of the Joint Committee on Taxation, the Secretary shall furnish such committee with any return or return information specified in such request, except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

(2) *Chief of Staff of Joint Committee on Taxation.*—Upon written request by the Chief of Staff of the Joint Committee on Taxation, the Secretary shall furnish him with any return or return information specified in such request. Such Chief of Staff may submit such return or return information to any committee described in paragraph (1), except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

* * *

(4) *Agents of committees and submission of information to Senate or House of Representatives.*—

(A) *Committees described in paragraph (1).*—Any committee described in paragraph (1) or the Chief of Staff of the Joint Committee on Taxation shall have the authority, acting directly, or by or through such examiners or agents as the chairman of such committee or such chief of staff may designate or appoint, to inspect returns and return information at such time and in such manner as may be determined by such chairman or chief of staff. Any return or return information obtained by or on behalf of such committee pursuant to the provisions of this subsection may be submitted by the committee to the Senate or the House of Representatives, or to both. The Joint Committee on Taxation may also submit such return or return information to any other committee described in paragraph (1), except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

(B) *Other committees.*—Any committee or subcommittee described in paragraph (3) shall have the right, acting directly, or by or through no more than four examiners or agents, designated or appointed in writing in equal numbers by the chairman and ranking minority member of such committee or subcommittee, to inspect returns and return information at such time and in such manner as may be determined by such chairman and ranking minority member. Any return or return information obtained by or on behalf of such committee or subcommittee pursuant to the provisions of this subsection may be submitted by the committee to the Senate or the

House of Representatives, or to both, except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer, shall be furnished to the Senate or the House of Representatives only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

(i) *Disclosure to Federal officers or employees for administration of Federal laws not relating to tax administration.*—

* * *

(7) *Comptroller General.*—

(A) *Returns available for inspection.*—Except as provided in subparagraph (C), upon written request by the Comptroller General of the United States, returns and return information shall be open to inspection by, or disclosure to, officers and employees of the General Accounting Office for the purpose of, and to the extent necessary in, making—

(i) an audit of the Internal Revenue Service or the Bureau of Alcohol, Tobacco and Firearms which may be required by section 713 of title 31, United States Code, or

(ii) any audit authorized by subsection (p)(6), except that no such officer or employee shall, except to the extent authorized by subsection (f) or (p)(6), disclose to any person, other than another officer or employee of such office whose official duties require such disclosure, any return or return information described in section 4424(a) in a form which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer, nor shall such officer or employee disclose any other return or return information, except as

otherwise expressly provided by law, to any person other than such other officer or employee of such office in a form which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

* * *

(j) *Statistical use.*—

* * *

(4) *Anonymous form.*—No person who receives a return or return information under this subsection shall disclose such return or return information to any person other than the taxpayer to whom it relates except in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

RESPONDENT'S

BRIEF

No. 86-472

In the Supreme Court of the United States

OCTOBER TERM, 1987

CHURCH OF SCIENTOLOGY OF CALIFORNIA, PETITIONER

v.

INTERNAL REVENUE SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

CHARLES FRIED
Solicitor General

JAMES B. MANN
Acting Assistant Attorney General

ALBERT G. LAUBER, JR.
Deputy Solicitor General

ALAN I. HOROWITZ
Assistant to the Solicitor General

JONATHAN S. COHEN
MURRAY S. HORWITZ
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Section 6103 of the Internal Revenue Code prohibits the IRS from disclosing tax "return information," but defines that term to exclude "data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer." The question presented is whether this definition makes disclosable all documents that, either in their original or redacted version, do not appear to contain identifying details about the taxpayer to whom they pertain, or whether, as the court of appeals held, the definition makes disclosable only material that has been reformulated into a new form (such as a statistical tabulation) that is inherently incapable of being associated with a particular taxpayer.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

Statutes and regulations—Continued: Page

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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals panel (Pet. App. 24a-37a) is reported at 792 F.2d 146. The amended opinion of the en banc court of appeals (Pet. App. 38a-93a) is reported at 792 F.2d 153. The opinion of the district court (Pet. App. 1a-14a) is reported at 569 F. Supp. 1165.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 1986. On August 12, 1986, Justice White

extended the time within which to file a petition for a writ of certiorari to and including September 23, 1986. The petition was filed on that date and was granted on January 27, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant portions of Sections 6103, 6108 and 6110 of the Internal Revenue Code (26 U.S.C.) are set out in a statutory appendix (App., *infra*, 1a-20a).

STATEMENT

1. Section 6103(a) of the Internal Revenue Code[1] provides that "[r]eturns and return information shall be confidential" and shall not be disclosed "except as authorized by this title." Section 6103(b)(1) defines a "return" to mean "any tax or information return, declaration of tax, or claim for refund * * * which is filed with the Secretary * * * and any amendment or supplement thereto, including supporting schedules, attachments, or lists." Section 6103(b)(2) in turn provides an exhaustive definition of "return information." That definition includes

> a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined * * *, or any other data received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability * * * of any person * * * for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense * * *.

[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code (26 U.S.C.), as amended (the Code or I.R.C.).

"Return information" may be contained in or deduced from a variety of documents furnished to or generated by the IRS. "Return information," for example, includes data supplied by a taxpayer on a return, on some other IRS form, in correspondence with the IRS during the course of an audit, in negotiation with an IRS examiner or appeals officer, or in a formal protest to a proposed deficiency. "Return information" also includes data supplied to the IRS by third parties, such as information provided by a taxpayer's employer on a W-2 Form, or by a taxpayer's bank on a Form 1099. And "return information" will appear in numerous documents created by the IRS itself, such as a notice to a taxpayer that his return has been selected for audit, a report by an IRS examiner proposing adjustments to a return, or a formal notice of deficiency. "Return information" may also arise outside the audit and collection process, *e.g.*, in the context of a taxpayer's request for an IRS ruling. See I.R.C. § 6103(b)(2)(B).

After defining "return information" in this exhaustive fashion, Section 6103(b)(2) goes on to provide that "such term [viz., 'return information'] does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer." This proviso has come to be known as the "Haskell Amendment."[2]

[2] This language was introduced by Senator Haskell on the Senate floor as an amendment to the provision of the 1976

It is the meaning of this proviso that is the focus of this case.

2. On May 16, 1980, the Church of Scientology of California, petitioner here, filed a Freedom of Information Act (FOIA) request with the IRS. See J.A. 17a-27a. The request sought various types and categories of records, including documents related to a pending Tax Court case and "[c]opies of all information relating to or containing the names of Scientology, Church of Scientology, [or] any specific Scientology church" (*id.* at 19a).[3] Attached to petitioner's request was an authorization to disclose its own records, executed by its president (Pet. App. 10a). Petitioner attached no authorization to disclose the records of the other taxpayers listed in its request.

Tax Reform Act, Pub. L. No. 94-455, § 1202(a), 90 Stat. 1667, that is now codified in Section 6103. See 122 Cong. Rec. 24012 (1976); Pet. App. 43a.

[3] Specifically, the FOIA request sought "[c]opies of all records, correspondence or any form of information relating to and that might be characterized by the names Scientology, Church of Scientology, Hubbard, Dianetics, L. Ron Hubbard, Mary Sue Hubbard, located in the offices or personal areas of • • • [specified] Internal Revenue officials," as well as "[c]opies of all information relating to or containing the names of Scientology, Church of Scientology, any specific Scientology church or entity identified by [or] containing the words Scientology, Hubbard and/or Dianetics in their names, L. Ron Hubbard or Mary Sue Hubbard in the form of a written record, correspondence, document, memorandum, form, computor [*sic*] tape[s], computor [*sic*] program or microfilm; which is contained in the following systems of records, including but not limited to those located at the National Office, Regional Offices, Service Centers, District Offices or local IRS offices" [long list identifying IRS records systems omitted] (J.A. 19a-20a).

In a response dated July 22, 1980, the IRS asked for additional time to locate and consider releasing the records requested by petitioner (Pet. App. 26a). On September 17, 1980, treating the IRS's failure to respond by that time as a denial, petitioner filed an appeal to the Commissioner (J.A. 28a-31a). The Commissioner acknowledged the appeal, but did not immediately respond to it (Pet. App. 1a-2a).[4]

On December 18, 1980, petitioner brought this suit in the United States District Court for the District of Columbia to compel the IRS to release the requested documents. On June 24, 1983, the district court granted summary judgment in favor of the IRS (Pet. App. 1a-4a). Based upon in camera review of representative documents, the court first ruled that

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[4] In January 1981 the IRS filed a response (J.A. 47a-57a) to the administrative appeal in which it stated that it had limited its search to records of petitioner itself because the FOIA request did not contain authorization to disclose information pertaining to any other taxpayers named therein (*id.* at 48a). The search was limited geographically to the IRS National Office in Washington, D.C., and to IRS field offices in Covington, Kentucky and Los Angeles, California (*id.* at 48a-49a). The response also stated that all of the requested documents relating to a pending Tax Court case that had not previously been released were exempt from disclosure under 26 U.S.C. 6103(e)(7) on the ground that disclosure would seriously impair federal tax administration (J.A. 53a-54a). The IRS further explained that it was releasing in full some documents acquired subsequent to the preparation of an index in connection with the Tax Court case but that it was withholding portions of "other National Office documents on [the] grounds that they were outside the scope of the appeal, that their disclosure would cause a clearly unwarranted invasion of privacy, *see* 5 U.S.C. § 552(b)(6), or that they reflected return information of third parties, *see* 26 U.S.C. § 6103(a)" (Pet. App. 26a-27a; see J.A. 55a-57a).

the IRS had correctly withheld certain records and portions of records that were responsive to petitioner's request (*id.* at 4a-8a). The court next held that the IRS had correctly limited its search to records of petitioner itself, because none of the other taxpayers named in petitioner's FOIA request had submitted the requisite authorizations for disclosure of their records (*id.* at 10a-12a). Finally, the court concluded that "[respondent's] efforts to locate materials responsive to [petitioner's] request were reasonable and, therefore, adequate as a matter of law" (*id.* at 12a-13a).

Petitioner appealed, challenging among other things the adequacy of the IRS's search for responsive documents. In deciding to "limit [its] search to files whose titles refer to the California Church," the IRS had assumed that numerous other files could be excluded from the search on the ground that they contained only nondisclosable "return information" of third parties (Pet. App. 31a, 40a). Petitioner disputed that assumption, relying upon the interpretation given to the Haskell Amendment by the courts in *Neufeld* v. *IRS*, 646 F.2d 661 (D.C. Cir. 1981), and *Long* v. *IRS*, 596 F.2d 362 (9th Cir. 1979), cert. denied, 446 U.S. 917 (1980). Those decisions held that the Haskell Amendment removes from the defined category of protected information all material that, either in its original or its redacted version, does not disclose the identity of the taxpayer to whom it pertains. Petitioner argued, in other words, that "return information" ceases to be "return information" once the underlying document has been redacted to excise identifying details about the taxpayer. On that basis, petitioner contended that the IRS's rationale for excluding various files from its search was incorrect, since the documents in those

files would assertedly contain no "return information" once the documents had been redacted. The government, relying on *King* v. *IRS*, 688 F.2d 488 (7th Cir. 1982), argued that mere redaction is insufficient to transmute "return information" into disclosable material, and that the Haskell Amendment instead requires that return information have been reformulated by the IRS into "a form which cannot be associated with * * * a particular taxpayer" before it is subject to disclosure (I.R.C. § 6103(b)(2)). Since the IRS files at issue here did not contain any such reformulated data, the IRS contended that it had properly excluded those files from its search.

After the case had been briefed and argued before a panel, the court of appeals entered an order stating that the full court had decided, sua sponte, to consider en banc the following question, as to which supplemental briefing was requested (Pet. App. 15a-16a):

> Should the Court adhere to the interpretation of 26 U.S.C. § 1603(b)(2) [*sic*] adopted by the panel opinion in *Neufeld* v. *IRS*, 646 F.2d 661, 665 (D.C. 1981), or should it adopt a different interpretation, in particular that announced by the Seventh Circuit in *King* v. *IRS*, 688 F.2d 488, 490-[4]94 (7th Cir. 1982)?

3. On May 27, 1986, the en banc court of appeals issued an opinion addressing the meaning of the Haskell Amendment (Pet. App. 38a-89a).[5] On the same day, the panel issued an opinion addressing the other issues presented in the case, applying the holding of the en banc court to the facts of the case, and

[5] That opinion was subsequently amended by an order filed July 11, 1986 (Pet. App. 90a-93a).

vacating and remanding the case to the district court for further proceedings (*id.* at 24a-37a).[6]

In its en banc opinion, the court of appeals explicitly rejected its prior decision in *Neufeld* v. *IRS*, *supra*, and the holding of the Ninth Circuit in *Long* v. *IRS*, *supra*. The court held instead that the key to proper construction of the Haskell Amendment "is the crucial phrase 'in a form'" (Pet. App. 50a). The court reasoned that this phrase envisions "not merely the deletion of an identifying name or symbol on a document that contains return information, but agency *reformulation* of the return information into a statistical study or some other composite product," a reformulation that would "give[ ] added assurance that a taxpayer's identity will in fact not be disclosed" (*id.* at 51a (emphasis in original)). The court accordingly concluded that, in order for

[6] The panel opinion resolved a number of isues, some favorably to petitioner and others favorably to the government. The panel held that the disclosure provisions of Section 6103 do not supersede the FOIA, but rather qualify as a statute restricting disclosure within the ambit of FOIA Exemption 3, 5 U.S.C. 552(b)(3) (Pet. App. 27a-30a). The panel sustained the IRS's geographical restriction on its search (*id.* at 30a-31a), but held that the district court "erred in accepting the IRS's blanket assertion that all information responsive to [petitioner's] request in files not relating to the California Church was exempt from disclosure" (*id.* at 34a). The panel remanded the case for further proceedings in which the IRS would be required "either to conduct a new search for information responsive to the Church's request that refers to third parties or establish through affidavits that all information about third parties in identifiable files * * * is generically protected by Section 6103" (*id.* at 36a). Petitioner did not seek review of the panel's decision insofar as that decision was unfavorable to it, and we did not seek review of the panel decision insofar as it was unfavorable to the government.

otherwise-protected data to become eligible for disclosure under the Haskell Amendment, the statute "requires—in addition to the fact of nonidentification—some alteration by the government of the form in which the return information was originally recorded" (*id.* at 56a). The court stated that this "reformulation will typically consist of statistical tabulation or of some other form of combination with other data so as to produce a unitary product that disguises the origin of its components" (*ibid.*). The court noted its disagreement, however, with the government's submission and the Seventh Circuit's statement in *King* that such a reformulation would necessarily be limited to a statistical tabulation (*id.* at 55a-56a (citing *King*, 688 F.2d at 493)).

The court explained that both the detailed definition set forth in Section 6103(b)(2)(A) and the numerous exclusions set forth in Section 6110 (incorporated by reference in Section 6103(b)(2)(B)) are at odds with petitioner's contention that the attempted excision of identifying details suffices to make "return information" something other than "return information," and hence disclosable to the general public (Pet. App. 43a-45a). The court also noted that the language of the Haskell Amendment itself cannot be squared with petitioner's interpretation, because the text focuses on the "form" in which the material is found, a word that "suggests something other than merely the absence of identifying information" (*id.* at 45a). The court also stated that the manner of the Haskell Amendment's adoption—at the last minute, on the Senate floor, with no discussion other than the manager's comment that the Amendment "might not be entirely necessary" (122 Cong. Rec. 24012 (1976))—strongly militates against the notion, implicit in petitioner's argument,

that the Amendment wrought a "fundamental change" in the statutory scheme (Pet. App. 49a-50a). The court concluded that an interpretation of the Haskell Amendment that limits its application to material reformulated by the IRS so that it cannot be associated with a particular taxpayer "is the meaning most faithful to the text, most compatible with the remainder of the legislation, and most supportable by a plausible legislative intent" (*id.* at 57a).

Judge Silberman filed an opinion concurring in part (Pet. App. 58a-75a). He expressed the view that, because of the deference the court should accord to the IRS's statutory interpretation, he would agree with the Seventh Circuit's position that the exception set forth in the Haskell Amendment is limited to "statistical tabulations." Three judges dissented from the en banc opinion (*id.* at 76a-89a). They agreed with petitioner that the redaction of identifying details should suffice to bring material within the ambit of the Haskell Amendment.

SUMMARY OF ARGUMENT

A. The text of Section 6103(b) compels rejection of the view that "return information" ceases to be "return information," and hence must be disclosed in response to FOIA requests, once the underlying document has been redacted of identifying details. The Haskell Amendment purports to be no more than an element of the definition of "return information," not a directive to alter and then release a document that is indisputably "return information." Moreover, the view that the protection for return information is limited to identifying details would make most of the text of Section 6103(b)(2) unnecessary. Section 6103(b)(2)(A) defines "return information" to include, not only "a taxpayer's identity," but more than a dozen other categories of return-related data. And Section 6103(b)(2)(B) brings within the definition of return information some data, like trade-secret information, that is plainly meant to be protected whether or not it contains identifying details.

Even the text of the Haskell Amendment read in isolation does not support petitioner's view. The mere redaction of identifying details from a document containing "return information" does not convert that data into "a form which cannot be associated with * * * a particular taxpayer." The data remains individualized information, and it can be associated with a particular taxpayer with the benefit of certain other data. The redaction simply reduces the probability that the requester can make the correct association, but "redaction cannot eliminate all risks of identifiability" (*Department of Air Force* v. *Rose*, 425 U.S. 352, 381 (1976)). Rather, the Haskell Amendment's use of the phrase "in a form" shows that it was meant to cover the situation in which the IRS has "reformulated" return information into a new form, such as a statistical compilation. This is the obvious meaning of the phrase elsewhere in Section 6103. See I.R.C. § 6103(i)(7)(A) and (j)(4).

Petitioner's contention that "return information" ceases to be "return information" once identifiers are removed is also at odds with Section 6103(f). That provision, which concerns disclosures to Congressional committees, plainly contemplates that material can be "nonidentifying" and still qualify as return information, for it says that "identifying" return information can be disclosed only to a committee meeting in closed session. Moreover, Section 6110 of the Code, which concerns publication of IRS written determinations, provides extensive procedural protec-

tions for a taxpayer before *redacted* information is disclosed. This concern over the release of redacted material cannot be reconciled with petitioner's contention that all confidential return information must be redacted and disclosed—without any notice or opportunity to be heard afforded to the taxpayer involved.

B. The text of Section 6103 makes clear that the committee bill reported to the Senate did not contemplate and did not provide for disclosure of return information upon redaction of identifying details. Under petitioner's interpretation, therefore, the Haskell Amendment obviously effected a "major change" (Pet. App. 84a (Wald, J., dissenting)) in the statute. But the manner in which the Amendment was enacted—by voice vote on the floor without discussion—strongly suggests that it was intended to do no more than clarify the committee proposal or make a minor correction in it. This conclusion is confirmed by the only two statements made on the floor when the Amendment was passed. Senator Haskell stated that the purpose of the Amendment was to insure the continued disclosure of "statistical studies and other compilations of data now prepared by the Internal Revenue Service," and Senator Long remarked that the Amendment "might not be entirely necessary" (122 Cong. Rec. 24012 (1976)). Thus, the Amendment appears to have been designed only to assure the disclosability of statistics and compilations of data akin to those addressed by Section 6108.

Senator Haskell also stated (122 Cong. Rec. 24012 (1976)) that his proposal was intended "to neither enhance nor diminish" public access to return information as compared to pre-1976 law. But the pre-existing law, as embodied in the governing Treasury

Regulations under Section 6103, provided very little access outside the government to return information. The pre-1976 regulations plainly did not allow access on anywhere near the scale that petitioner asserts is guaranteed by the Haskell Amendment.

C. The policy of protecting taxpayer privacy, which was Congress's preeminent concern in enacting the 1976 amendments, would be severely compromised under petitioner's view. Redacted return information is still capable of being associated with a particular taxpayer, depending upon the independent knowledge possessed by the FOIA requester, and the IRS has no way of determining the extent of the requester's knowledge. Congress determined in 1976 that the use of return information for purposes other than tax administration should be severely limited (see S. Rep. 94-938, 94th Cong., 2d Sess. 317-318 (1976)), and it expressed no interest in having this information made available to the population at large. Congress's determination to preserve the confidentiality of tax return information is similar to the judgment it made in the case of census data, where Congress was also concerned that essential public cooperation in providing information be maintained through a strong guarantee of confidentiality.

ARGUMENT

SECTION 6103(a) OF THE CODE PROTECTS "RETURN INFORMATION" FROM PUBLIC DISCLOSURE EVEN IF THE DOCUMENTS CONTAINING SUCH INFORMATION ARE REDACTED WITH A VIEW TO CONCEALING THE TAXPAYER'S IDENTITY

A. Introduction

The tax laws require millions of individuals and business entities to furnish the IRS with highly confidential information. This information, as well as the countless documents that are created and collected

by the IRS in connection with it, is indispensable to the administration of the revenue laws. The effective operation of our tax system hinges on the submission of this data by the public with a minimum of government compulsion.

Congress has recognized that taxpayers' willingness to provide such private information depends on their trust that it will remain confidential. Congress therefore has taken steps to guarantee that confidentiality by statute. Section 6103 of the Code, an extremely detailed and complex provision, prohibits the IRS from disclosing tax "returns" and tax "return information" except in specifically enumerated circumstances. This prohibition is enforced by civil and criminal penalties. Section 7213 makes unauthorized disclosure of return information a felony, punishable by fine and up to five years' imprisonment; a federal employee convicted of this offense must be discharged from his employment. Section 7431 provides a civil damages remedy against the United States or against a nonfederal employee who violates Section 6103; the statute permits recovery of actual damages, with a minimum recovery of $1,000 for each act of unauthorized disclosure.

Section 6103's prohibition against the disclosure of tax return information dates back to Section 11 of the Act of July 14, 1870, ch. 255, 16 Stat. 259, which prohibited the publication of "income returns, or any part thereof, except * * * general statistics." Similar nondisclosure provisions were subsequently enacted for other kinds of tax returns. These nondisclosure provisions were carried forward into Section 55 of the Internal Revenue Code of 1939, ch. 2, 53 Stat. 29, and were recodified in Section 6103 of the Internal Revenue Code of 1954, ch. 736, 68A Stat. 753.

Prior to its amendment in 1976, Section 6103 provided that tax returns were "public records," but that they generally were open to inspection only upon order of the President and under regulations prescribed by the Secretary of the Treasury. See 26 U.S.C. (1970 ed.) 6103(a)(1). These regulations greatly restricted public access to tax returns. Inspection of individual returns was limited to the taxpayer himself and to specified persons who had a material interest in the return by virtue of their connection to the taxpayer—his attorney, a receiver if the taxpayer was bankrupt, or a guardian or trustee who stood in his stead for some other reason (Treas. Reg. § 301.6103(a)-1(c)(1)(ii) (1974)). The regulations established procedures regulating the inspection of tax returns by state governments and by various components of the federal government; such requests were typically treated on a case-by-case basis. See generally S. Rep. 94-938, 94th Cong., 2d Sess. 315-316 (1976). Although the regulations made no provision for disclosure of tax returns to interested members of the public, they did provide that return information could be released "in the discretion of the Secretary" (Treas. Reg. § 301.6103(a)-1(a)(3)(i) (1974)).

In 1976, Congress became concerned that tax return information was being transmitted too freely by the IRS to other parts of the government, and that such information had sometimes been used to harass taxpayers for partisan political purposes. Congress therefore acted to expand the statutory protection afforded by Section 6103. In the Tax Reform Act of 1976, Pub. L. No. 94-455, § 1202(a), 90 Stat. 1667, Congress substituted for the prior statute an enlarged and far more detailed version of Section 6103. The new Section 6103 established statutory confidentiality

rules, rather than leaving to regulation and Presidential order the circumstances under which tax return information could be disclosed. These changes were designed to effectuate Congress's intent that "returns and return information should generally be treated as confidential and not subject to disclosure except in those limited situations delineated in the newly amended section 6103" (S. Rep. 94-938, *supra*, at 318).

Section 6103(a) as amended prohibits disclosure of "returns" and of "return information," a new term not contained in the prior version of the statute. "Return" and "return information" are defined in excruciating detail in Section 6103(b). Section 6103 (c) through (o) sets forth exceptions to this general rule for situations in which Congress deemed disclosure appropriate, subject to the conditions set forth in the statute. These exceptions encompass disclosures to state tax officials (§ 6103(d)), Congressional committees (§ 6103(f)), and the President (§ 6103(g)), as well as to officials of enumerated federal agencies for tax administration purposes (§ 6103(h)), for statistical purposes (§ 6103(j)), and for other legitimate purposes, such as criminal investigation (§ 6103 (i)). The statute also provides for disclosure to a limited class of persons other than government officials—to the taxpayer, to his designee, and to certain persons connected with the taxpayer, such as shareholders of a corporation or partners in a partnership, who are deemed to have an interest in the data (§ 6103 (c) and (e)). This latter provision closely corresponds to the pre-1976 regulation authorizing disclosure to persons having a material interest. See Treas. Reg. § 301.6103(a)-1(c) (1974); S. Rep. 94-938, *supra*, at 339. Finally, the statute enumerates miscellaneous types of permissible disclosures, including disclosures, both inside and outside the government, for tax investigation purposes (§ 6103(k)(6)), disclosures designed to correct published misstatements of fact about a taxpayer (§ 6103(k)(3)), and disclosures designed to aid in notifying persons entitled to tax refunds (§ 6103(m)(1)).

The focus of this case is on the definition of "return information" contained in Section 6103(b)(2). That definition enumerates a long list of data protected from disclosure, including a taxpayer's identity, the nature, source, or amount of his income or assets, and "any other data" prepared or collected by the Secretary with respect to a return or the possible existence of a tax liability on the part of any person. During the Senate debate on the 1976 legislation, Senator Haskell proposed that the committee's version of Section 6103(b)(2) be amended to provide at its conclusion that "such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer." He explained that "the purpose of this amendment is to insure that statistical studies and other compilations of data now prepared by the Internal Revenue Service and disclosed by it to outside parties will continue to be subject to disclosure to the extent allowed under present law" (122 Cong. Rec. 24012 (1976)). Senator Long, the Senate manager of the legislation, replied that the amendment "might not be entirely necessary, but it might serve a good purpose. I will be happy to take it to conference." *Ibid.* The amendment, which has come to be known as the Haskell Amendment, was then adopted by voice vote in the Senate and was enacted as part of the conference bill.

It is petitioner's contention that this hastily adopted amendment has the effect of making the entire universe of "return information," which on its face is protected from disclosure by Section 6103(a), releaseable to the general public once the document containing it has been redacted to remove certain details concerning the taxpayer's identity. This contention cannot withstand analysis. It is almost inconceivable that Congress intended, by means of a floor amendment adopted by voice vote without debate or committee consideration, to turn a carefully considered provision upside down and convert a confidentiality statute into a statute requiring redaction and disclosure. This is particularly evident when one considers that the 1976 version of Section 6103, which indisputably was designed to *enhance* the confidentiality of tax returns, would have the effect under petitioner's theory of making available to the public tremendous quantities of return information that had been barred from disclosure prior to 1976.

The text of the Haskell Amendment does not require such a bizarre result. To the contrary, the Amendment's language, particularly when read in conjunction with the other portions of Section 6103 that were carefully considered by the Senate committee, strongly supports the court of appeals' holding that return information is not rendered disclosable simply by redacting the underlying document to remove identifying details from it. Accord, *Currie* v. *IRS*, 704 F.2d 523 (11th Cir. 1983); *King* v. *IRS*, 688 F.2d 488 (7th Cir. 1982); contra, *Long* v. *IRS*, 596 F.2d 362 (9th Cir. 1979), cert. denied, 446 U.S. 917 (1980). Rather, as the court of appeals held, information that can be associated with a particular taxpayer, either because it was supplied by him or was connected with

a determination of his tax liability, is "return information" that must be kept confidential unless the government has converted it into a form that no longer can be associated with a particular taxpayer.

B. The Text Of Section 6103 Compels Rejection Of The View That Confidential Return Information Must Be Disclosed Upon Redaction Of The Underlying Document

1. In ascertaining the correct interpretation of the Haskell Amendment, it is useful to begin by examining the structure of the statute's opening two provisions. Section 6103(a) and (b) together evidence a legislative design to guarantee the confidentiality of a broad category of tax return information. Congress's mode of drafting those two provisions is surely at odds with petitioner's view.

Section 6103(a) establishes the general rule that "[r]eturns and return information shall be confidential" and shall not be disclosed "in any manner" unless explicitly authorized by statute. When a request for certain records is made, Section 6103(a) suggests that the IRS must first inquire whether the request seeks a "return" or "return information." If it does, the statute directs that disclosure is barred unless the request meets one of the statutorily enumerated exceptions. Section 6103(a) does not appear to contemplate petitioner's quite different view that, if the request is found to seek "return information," the IRS must redact the underlying document and then disclose the return information, apart from the taxpayer's identity, in its entirety.

Petitioner's interpretation of the Haskell Amendment is likewise hard to reconcile with the detailed provisions of Section 6103(b). Section 6103(b)(2)(A) defines "return information" to include "a taxpayer's identity," the "nature, source or amount" of

14 different tax-return-related figures (such as income, deductions, and net worth), and "any other data" associated with the determination of any person's liability. Yet under petitioner's reading of the statute, none of these enumerated items, save the taxpayer's identity, is confidential at all. Rather, each must be disclosed after the document on which it appears has been purged of material that would obviously identify the taxpayer. Petitioner's view of the statute, as the court of appeals put it, is thus "akin to defining mankind as 'all mammals in the world, but excluding those which are not relatively hairless bipeds with the power of abstract reasoning'" (Pet. App. 44a). If petitioner is right, in other words, it is hard to see what purpose is served by the statute's detailed catalogue of "return information," since the statute would need to say only that taxpayer-identifying information is confidential and that all other information is not.

The incorrectness of petitioner's reading of the Haskell Amendment is even more starkly illustrated by examining Section 6103(b)(2)(B). That subsection incorporates into the definition of "return information" portions of documents that are excluded from public inspection under Section 6110. That latter section, unlike Section 6103, is a disclosure statute in which Congress directed the IRS to release redacted versions of certain "written determinations"—private letter rulings, determination letters, and technical advice memoranda—as well as "background file documents" relating to such written determinations. Section 6110(c), however, excludes from the public inspection requirement several kinds of data that must be deleted before a document is released. These include not only identifying details about the taxpayer

(§ 6110(c)(1)), but also trade secrets (§ 6110(c)(4)) and information prepared for the use of an agency regulating financial institutions (§ 6110(c)(6)). Under Section 6103(b)(2)(B), this excluded information, such as trade-secret information, is deemed "return information" even though it may not contain any identifying details; and the evident statutory design is that such information should be immune from disclosure under Section 6103 to the same extent that it is exempted from public inspection under Section 6110.

Under petitioner's theory, however, the Haskell Amendment would have the effect of repealing some of the exemptions that Section 6103(b)(2)(B) had granted in the immediately preceding clause. For example, trade-secret information, after being redacted by the IRS to conceal the taxpayer's identity, would apparently lie outside the ambit of "return information" protected by Section 6103(b)(2)(B), even though it is expressly immunized from public inspection under Section 6110. It is hard to believe that Congress had such an odd result in mind when it enacted the statute, particularly since it noted that information exempted from public inspection under Section 6110 should be "subject to the *nondisclosure* rules of section 6103" (S. Rep. 94-938, *supra*, at 311 (emphasis added)).[7]

[7] Indeed, if petitioner's reading of the Haskell Amendment is correct, it was hardly necessary for Congress to have troubled with Section 6110 at all, since the written determinations referred to therein would be disclosable after redaction under Section 6103. Essentially, as amicus John Neufeld candidly admits (see Br. 13-14), petitioner seeks to turn the confidentiality provisions of Section 6103 into a disclosure statute akin to Section 6110. That is plainly incon-

2. Examination of the full text of Section 6103(a) and (b) thus shows that Congress intended this confidentiality statute to embrace *all* return information, even after identifying details are deleted from it. Petitioner's argument to the contrary (Br. 17-24) is based primarily on a limited examination of the statute, focusing entirely on the words of the Haskell Amendment read in isolation. This approach is altogether at odds with the text of Section 6103. As this Court has stated on several occasions, "'[i]n expounding a statute, [one] must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and its object and policy.'" *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975) (quoting *United States* v. *Heirs of Boisdoré*, 49 U.S. (8 How.) 113, 122 (1849)). But even if the Haskell Amendment is read in isolation, its text does not support petitioner's argument that return information must be disclosed with identifying details removed.

First, the Haskell Amendment is part of the definition of "return information." It is designed to help answer the question whether a particular document in the IRS's possession falls within that defined category, in which case its confidentiality is statutorily guaranteed. The Haskell Amendment does not purport to direct the IRS to alter documents so as to render them disclosable. Yet that is precisely the effect that petitioner would ascribe to it. When a FOIA request is made for a document that indisputably contains return information, petitioner maintains that, despite the clear mandate of Section 6103(a), the document is not protected from disclosure;

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sistent with the intent of the Congress that simultaneously drafted two such disparate provisions.

rather, the Haskell Amendment requires that it be redacted and released. Petitioner thus reads the Haskell Amendment, contrary to its clear import, as a provision compelling alteration and disclosure of protected material, not as an element of the definition that determines whether particular material is protected to begin with.

Besides misapprehending the Haskell Amendment's function, petitioner's argument fails to give effect to its language. The Amendment provides that "return information" does not include "data *in a form* which cannot be associated with, or otherwise identify * * * a particular taxpayer" (I.R.C. § 6103(b)(2) (emphasis added)). But the mere redaction of a taxpayer's name and social security number from (for example) a list of her charitable contributions does not convert that data into a *form* in which it cannot be associated with her. The redaction may make it relatively difficult for the FOIA requester to match the data to the right person; that depends on how much other knowledge the requester has. But the data remains a list of a particular taxpayer's charitable contributions—quintessentially individualized information, which is plainly "in a form which can[] be associated with * * * a particular taxpayer." Especially in light of the fact that "redaction cannot eliminate all risks of identifiability" (*Department of Air Force* v. *Rose*, 425 U.S. 352, 381 (1976)), it is apparent that mere elimination of identifying details does not meet the standard set by the Haskell Amendment.[8]

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[8] The Haskell Amendment speaks in absolute terms; it permits the IRS to release only "data in a form which *cannot* be associated with or otherwise identify, directly or indirectly, a particular taxpayer" (122 Cong. Rec. 24012 (1976) (em-

Indeed, the statute's use of the phrase "in a form" clearly shows that the Haskell Amendment refers to "something other than merely the absence of identifying information" (Pet. App. 45a). If the only focus of the Haskell Amendment were on the redaction of identifying details, the phrase "in a form" would be superfluous, "as reading the provision without it will demonstrate" (*ibid.*). A more natural wording of a statute that simply ordered redaction would be that found in 5 U.S.C. 552(a)(2), which states that "an agency may delete identifying details," or in Code Section 6103(f)(1), governing disclosure to congressional committees, which limits disclosure of "return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer." Since the phrase "in a form" does not appear in Section 6103(f)(1), whose operative language is otherwise identical to that of the Haskell Amendment, the inclusion of that phrase in the Haskell Amendment cannot be thought accidental. But petitioner's construction would effectively eliminate that phrase from Section 6103(b)(2) by rendering it nugatory.

A reading of the Haskell Amendment that gives effect to the phrase "in a form" is that articulated by the court of appeals—namely, that the statute requires, as a condition of disclosability, "some alteration by the government of the form in which the return information was originally recorded" (Pet. App. 56a). Under this reading, material that falls

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phasis added)). The statute by its terms does not permit release of information based merely on a judgment that it is *unlikely* to be associated with a particular taxpayer. Accordingly, the language of the Haskell Amendment dictates that information must not be released if there is any possibility that it can be associated with a particular taxpayer.

within the definition of "return information" retains that status unless and until it has been "reformulated" by the IRS into a form, such as a statistical tabulation or compilation, that no longer can be associated with a particular taxpayer. This reading makes sense of the full text of the Haskell Amendment, and is supported by the other statutory contexts in which analogous language appears.[9] The Haskell Amendment thus establishes that material categorized as "return information" is not necessarily protected from disclosure forever; it can lose its protected status, but only upon reformulation, not upon simple redaction of identifying details.

Finally, it is significant that the Haskell Amendment is appended only to the definition of "return information" in Section 6103(b)(2); it does not modify the definition of "return" in Section 6103

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[9] As the court of appeals noted (Pet. App. 51a-52a), the language of the Haskell Amendment, including the phrase "in a form," occurs in two other places in Section 6103. Section 6103(j), which is entitled "Statistical Use," permits IRS disclosure to specified agencies for the purpose of preparing statistics and economic forecasts. Section 6103(j)(4), entitled "Anonymous Form," provides that no person who receives information under Subsection (j) "shall disclose such return or return information * * * except in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer." In this context, it is manifest that the phrase "in a form" contemplates reformulation of the return information into statistics or some other composite product. By the same token, Section 6103(i)(7)(A), which prohibits disclosure of return information furnished to the General Accounting Office for the purpose of conducting audits, [illegible] it is "in a form" that cannot be associated with a particular taxpayer, also appears to contemplate reformulation of the information into a new composite product, such as an audit report.

(b)(1). This placement is most peculiar if petitioner's reading of the Amendment is correct. If Congress thought that its taxpayer privacy concerns were adequately served by the redaction of identifying details, it is not apparent why it would not have made tax returns themselves, as well as return information, disclosable upon redaction. Yet it is manifest from the statute that "returns" are not disclosable, redacted or not. The protection afforded returns in Section 6103(b)(1), moreover, would be eviscerated by petitioner's construction of the Haskell Amendment, because all the information contained on a return would still have to be redacted and disclosed to a requester under Section 6103(b)(2). For example, a schedule of charitable contributions attached to a Form 1040 is included within the definition of "return" in Section 6103(b)(1), and hence would not be disclosable upon redaction even under petitioner's theory. Yet that identical list, if it were copied onto an examining agent's report, would on petitioner's view have to be redacted and disclosed in response to an FOIA request.[10]

3. Petitioner's reading of the Haskell Amendment is also difficult to square with other provisions enacted in 1976 that delineate the situations in which Congress found disclosure to be appropriate. Petitioner

[10] Whereas the placement of the Haskell Amendment makes little sense under petitioner's theory, it makes perfect sense under the court of appeals' view that the Amendment presupposes reformulation rather than redaction. Section 6103(b)(1) speaks of tax returns and other physical documents, which cannot be "reformulated," so that no purpose would be served by having the Haskell Amendment apply to it. Section 6103(b)(2), by contrast, speaks of "return information," which can be reformulated into a new form that will ensure protection of taxpayer privacy.

reads the confidentiality protection of Section 6103 as limited to identifying information. If that is so, then the extensive list of exceptions contained in Section 6103(c) through (o), which enumerate the instances of permissible disclosure, are necessarily addressed only to return information that discloses identifying details. But it is clear from the statute that this was not Congress's understanding of Section 6103.

Section 6103(f), for example, describes the conditions under which returns and return information may be disclosed to committees of Congress. Section 6103(f)(1) provides that, upon written request by the appropriate committee chairman:

> the Secretary shall furnish such committee with any return or return information specified in such request, except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

This subsection obviously distinguishes between "nonidentifying" return information, which may be supplied to a committee in open session, and "identifying" return information, which may be supplied to a committee only in closed executive session. See also I.R.C. § 6103(f)(2), (4)(A) and (4)(B). As the court of appeals stated (Pet. App. 46a), these provisions plainly contemplate the existence of "return information" that is nonidentifying. That understanding is completely inconsistent with petitioner's interpretation of the Haskell Amendment, under which return information rendered nonidentifying by redaction is no longer "return information" at all.

In enacting Section 6103, moreover, Congress's concern over disclosure was not restricted solely to the danger that particular information would be associated with a particular person to the detriment of taxpayer privacy. Section 6103(c) and (e)(7), for example, deals with requests for return information by the taxpayer, his designee, or a person having a material interest by virtue of his connection to the taxpayer. Because such a request comes in essence from the taxpayer's alter ego, any resulting disclosure by the IRS obviously risks no invasion of privacy. Congress nonetheless provided that the IRS need not comply with such a first-party request if disclosure would "seriously impair federal tax administration" (§ 6103(c) and (e)(7)). Under petitioner's interpretation of the Haskell Amendment, however, a *third-party requester* could obtain access to the same information, so long as identifying details are removed, without giving the IRS any opportunity to withhold disclosure on the ground that it would impair federal tax administration. Petitioner's theory thus leads to the untenable result of making return information less accessible to a taxpayer's agent than to a member of the general public.

Petitioner's interpretation of the Haskell Amendment is also difficult to reconcile with Section 6110 of the Code, which was enacted in 1976 contemporaneously with the Haskell Amendment. Section 6110 is a disclosure statute that directs the IRS to release redacted versions of IRS written determinations and related background documents. After redaction to remove identifying details and other portions deemed confidential (§ 6110(c)), these documents are generally made available for public inspection without the need for any special request, and they are published in an index that is available to

anyone. In enacting Section 6110, however, Congress recognized that redaction by the IRS could not be relied upon to guarantee taxpayer privacy in every case, and it therefore established additional protections for taxpayers. Section 6110(f) accordingly requires the IRS, before releasing a written determination, to notify the taxpayer of the impending disclosure. If the taxpayer believes that the disclosure should not be made or that additional deletions are necessary, he is given the opportunity to seek administrative relief and, if necessary, file a petition in the Tax Court to litigate the issue before the IRS can release the documents under Section 6110.[11]

If petitioner's interpretation of the Haskell Amendment is correct, therefore, Congress has established more restrictions on disclosure and more procedural protections for taxpayers in connection with the release of IRS written determinations under Section 6110 than it has established for the release of confidential return information covered by Section 6103. But such an approach would surely be perverse. As the court of appeals noted (Pet. App. 48a), there are special reasons for making IRS rulings and other written determinations public—namely, to avoid the development of "secret law." See S. Rep. 94-938, *supra*, at 305-306. No such rationale supports the publicity of confidential return information.

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[11] Congress explicitly recognized in Section 6110 that mere redaction of identifying details does not infallibly protect against intrusions into taxpayer privacy. Thus, even though the statute provides that identifying details must be removed before written determinations are made public (§ 6110(c)(1)), the statute in addition requires the Secretary to delete any "information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" (§ 6110(c)(5)). See S. Rep. 94-938, *supra*, at 309.

On the other hand, there are special reasons for keeping return information private, for it may cover such sensitive matters as audits, criminal investigations, and a vast panoply of personal financial information. Written determinations disclosable under Section 6110, by contrast, often will involve less sensitive data, such as material that a taxpayer voluntarily supplies to the IRS in the hope of obtaining a ruling. Thus, the significant procedural protections erected by Congress in Section 6110 that must precede release of a redacted written determination strongly suggest that Congress did not intend redaction to be sufficient, without more, to make the entire universe of return information disclosable to the general public.[12]

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[12] To the extent there is any uncertainty about the meaning of the statute, of course, the interpretation of the agency charged with administering it is entitled to deference. See, *e.g.*, *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 844-845 (1984); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). The IRS has been charged with the interpretation of rules governing disclosure of return information since long before the Haskell Amendment was enacted. Indeed, disclosure of such information before 1976 was governed largely by regulations issued by the IRS. Because the Haskell Amendment was designed to do no more than authorize the IRS to "continue to release * * * statistical studies and compilations of data" (122 Cong. Rec. 24012 (1976) (Sen. Haskell)), the IRS's interpretation is clearly entitled to deference.

Petitioner asserts (Br. 32) that the IRS's position has not been consistent because it originally responded to the Church's FOIA request in this case by supplying some documents with identifiers removed. But this response did not reflect agreement with petitioner's interpretation of the Haskell Amendment. The documents to which petitioner refers (J.A. 44a-45a, 56a) state that all third-party return information was deleted prior to disclosure, not, as petitioner's interpretation would require, that the return information was being disclosed with identifying details removed. Petitioner also adverts (Br. 31-32) to some congressional testimony by Acting Commissioner Williams in 1977. See *Treasury, Postal Service, and General Government Appropriations for Fiscal Year 1978: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 95th Cong., 1st Sess. Pt. 1, at 442-446 (1977). That testimony concerned an IRS proposal, antedating the enactment of the 1976 amendments to Section 6103, to publish a list of inquiries made by Congressmen to the IRS, without disclosure of the identity of the taxpayer to whom the inquiries pertained. Because such a list would have been a reformulation of data in the original inquiries, it is unclear why petitioner regards this testimony as reflecting IRS adoption of petitioner's interpretation of the Haskell Amendment. In any event, the IRS subsequently decided not to go forward with the proposal, largely because of its concern that the disclosure would be of questionable legality under the new Section 6103.

C. The Legislative History Of Section 6103 Shows That It Was Not Intended To Authorize The Redaction And Disclosure Of All Return Information

1. The background of the 1976 legislation makes clear that Congress did not intend the statute to authorize the redaction and disclosure of confidential return information to the general public. As noted earlier (page 17, *supra*), the Haskell Amendment was introduced during Senate floor debate and was adopted by voice vote without discussion. The only comment made by anyone other than Senator Haskell was Senator Long's statement that he would be happy to take the Amendment to conference even though it "might not be entirely necessary" (122 Cong. Rec. 24012 (1976)). Neither Conference Report makes any reference to the Amendment. See H.R. Conf. Rep. 94-1515, 94th Cong., 2d Sess. (1976); S. Conf. Rep. 94-1236, 94th Cong., 2d Sess. (1976). The circumstances of the Amendment's adoption thus belie

any suggestion that it was meant to effect a major change in Section 6103 as reported by the committee. Rather, the manner in which the Amendment was adopted indicates that Congress intended at most to fill an interstice in the bill or to effect a relatively minor clarification.

The fact of the matter is, however, that the Haskell Amendment as interpreted by petitioner would have turned the statute upside down. Petitioner maintains that all return information must be disclosed in response to an FOIA request, so long as identifying data are removed. In the absence of the Haskell Amendment, it is undisputed that these billions of documents would be fully protected from disclosure under Section 6103, apart from the limited exceptions specifically authorized by that section. Indeed, the dissent in the court of appeals recognized, with some understatement, that the Haskell Amendment, under its and petitioner's interpretation, worked a "major change" in the statute (Pet. App. 84a (Wald, J., dissenting)).

Petitioner nonetheless denies (Br. 26) that the Haskell Amendment effected a "fundamental change" in the committee proposal, theorizing that it had been Congress's intention all along to compel the redaction and disclosure of return information, even though the language of the committee bill did not so indicate. But this contention cannot be squared with the provisions of the committee proposal. As we have pointed out earlier (pages 20-21 and 27, *supra*), various subsections of Section 6103 as originally proposed, such as the provision governing disclosure to congressional committees (§ 6103(f)) and the provision defining "return information" to include material excised before publication of written determinations (§ 6103(b)(2)(B)), clearly presuppose the existence of *nonidentifying* return information. And these portions of the statute cannot be dismissed as mere "superfluit[ies]" that are "fully explainable by the legislative process which occurred here, with the Haskell Amendment being appended to an otherwise fully-drafted statute" (Pet. Br. 36 & n.33). The subsections to which we refer were part of the carefully crafted committee bill, not accidents of a hasty floor amendment. And these subsections conclusively demonstrate that the committee proposal did not contemplate that "return information" would cease to be "return information" upon mere redaction of identifying details. Contrary to petitioner's statement, therefore, its position does require acceptance of the proposition that the Haskell Amendment effected a "fundamental change" in the committee bill. As we have shown, it is exceedingly unlikely that Congress would have made such a fundamental change in the cavalier fashion evidenced by the Haskell Amendment's adoption on the Senate floor.

2. The true purpose of the Haskell Amendment, as shown by Senator Haskell's remarks when introducing it, was to accomplish a minor clarification of the committee bill. He stated (122 Cong. Rec. 24012 (1976)):

> [T]he purpose of this amendment is to insure that statistical studies and other compilations of data now prepared by the Internal Revenue Service and disclosed by it to outside parties will continue to be subject to disclosure to the extent allowed under present law. Thus the Internal Revenue Service can continue to release for research purposes statistical studies and compilations of data, such as the tax model, which do not identify individual taxpayers.

> The definition of "return information" was intended to neither enhance nor diminish access now obtainable under the Freedom of Information Act to statistical studies and compilations of data by the Internal Revenue Service. Thus, the addition by the Internal Revenue Service of easily deletable identifying information to the type of statistical study or compilation of data which, under its current practice, has been subject to disclosure, will not prevent disclosure of such study or compilation under the newly amended section 6103. In such an instance, the identifying information would be deleted and disclosure of the statistical study or compilation of data be made.

In short, the Haskell Amendment was unambiguously directed at "statistical studies and compilations of data," not at the sort of particularized return information, contained in millions of individual taxpayer files, that petitioner seeks here.

Section 6108 of the Code has long required the IRS to publish certain "statistics * * * of income," now described in Section 6108(a). Compare 26 U.S.C. (1970 ed.) 6108. Section 6108(b) of the Code, newly enacted in 1976 (Pub. L. No. 94-455, § 1202(b), 90 Stat. 1685), authorizes the IRS, upon written request, to "make special statistical studies and compilations involving return information (as defined in Section 6103(b)(2)) and to furnish to [the requester] transcripts of any such special statistical study or compilation." Section 6108(c), likewise newly enacted contemporaneously with the Haskell Amendment, provides that "[n]o publication * * * required or authorized by [Section 6108] shall in any manner permit the statistics, study, or any information so published * * * to be associated with, or otherwise identify, directly or indirectly, a particular taxpayer."

While Section 6108 *requires* the IRS to publish some statistics, and while it *authorizes* the IRS in its discretion to publish others, it does not specifically say what the IRS is to do with an FOIA request for statistical information not covered by that Section. The Haskell Amendment was evidently designed to fill this lacuna and ensure that Section 6103 would not be read to mandate denial of such a request. Thus, so long as the statistical information or compilation of data is in a form that cannot be associated with a particular taxpayer, even if its source is return information and even if its disclosure is not specifically authorized or required by Section 6108, the Haskell Amendment provides that its disclosure is not prohibited by Section 6103.

This interpretation of the Haskell Amendment accords with its language and with Senator Haskell's explanation of its purpose. Indeed, in referring to "statistical studies and compilations"—words borrowed verbatim from the contemporaneously enacted Section 6108(b)—Senator Haskell clearly indicated that he had in mind generalized studies of the sort mentioned in Section 6108. An interpretation of the Haskell Amendment that limits it to statistical reformulations likewise accords with the Senate manager's reaction to the proposal, namely, that "[i]t might not be entirely necessary, but it might serve a good purpose" (122 Cong. Rec. 24012 (1976)). In short, the genesis of this floor amendment reveals that it was meant to clarify the relationship between Sections 6103 and 6108 and to backstop the latter Section's authorization for disclosure of IRS statistical studies. The legislative history simply does not support petitioner's grandiose expansion of the Haskell

Amendment into a freedom-of-information provision covering all tax return information.[13]

[13] Petitioner maintains (Br. 27-29) that Senator Haskell's reference to the "tax model" (122 Cong. Rec. 24012 (1976)) shows that his Amendment was designed to require redaction and disclosure of return information. The "tax model" is a compilation of data on computer tape that the IRS began making available to the public for statistical purposes in 1962, pursuant to 26 U.S.C. (1970 ed.) 7515. It is called a "model" because it is meant to provide a cross-section of family incomes in the Nation as a whole. Some of the fields on the tape reflect data taken from tax returns; many other fields reflect computed amounts not taken directly from a return. See IRS Pub. No. 1023, General Description, 1976 Individual Tax Model File (Mar. 1979). Because the tax model prior to 1981 contained raw return data, it could theoretically have been manipulated to display various items of return information of a particular taxpayer, albeit without identifying details. (The IRS alleviated this problem in 1981 by "blurring" the data, *i.e.*, replacing original data values with averages of several values; therefore, the tax model today no longer can be manipulated to produce a series of return items relating to the same taxpayer. See generally Strudler, Oh and Scheuren, *Protection of Taxpayer Confidentiality With Respect to the Tax Model*, 1986 Am. Statistical Ass'n Sec. on Survey Research Methods at 375-381.) Petitioner accordingly argues that, if Senator Haskell intended to preserve taxpayer access to the tax model, which could have been used in 1976 to generate nonidentifying return information, Congress must have intended to require disclosure of *all* nonidentifying return information.

Senator Haskell's innocuous reference to the tax model simply will not bear the weight that petitioner puts on it. First, even if one assumes that Senator Haskell and Congress were intimately conversant with the details of what information could be extracted from the tax model's computer tape, it does not follow that they intended to remove the cloak of confidentiality from *all* return information. Disclosure of data from a sample generated by the IRS does not pose the same privacy concerns as disclosure of a particular taxpayer's return information, even if redacted, in response to a specific request. In any event, there is no reason to assume that Senator Haskell or the rest of Congress had any idea that the tax model could be manipulated in the manner that petitioner has now discovered to have been possible. It is more reasonable to assume that Senator Haskell understood the tax model to exemplify the type of nonindividualized information that was the Amendment's stated object, viz., "statistical studies and compilations of data." Hence, Senator Haskell's naked reference to the tax model does not in any way refute the overwhelming evidence that Congress did not intend to require redaction and disclosure of the return information whose confidentiality is guaranteed by Section 6103(a).

3. Petitioner's reading of the Haskell Amendment is further undermined by examination of the relevant law as it stood prior to 1976. It is undisputed that the purpose of the 1976 amendments was to restrict the dissemination of tax return information. Congress expressed concern that the preexisting level of disclosure had "breache[d] a reasonable expectation of privacy on the part of the American citizen," and it questioned whether return information "should be used for any purposes other than tax administration" (S. Rep. 94-938, *supra*, at 317). Congress stated that it had carefully "reviewed each of the areas in which returns and return information are now subject to disclosure" (*id.* at 318), including the area of statistical studies, where publication had long been authorized. See 26 U.S.C. (1970 ed.) 6108. Nothing in the statute or its legislative history suggests that Congress meant to *expand* disclosure of return information to include data that had theretofore been confidential. Indeed, Senator Haskell in introducing his Amendment eschewed any such purpose, stating that "[t]he definition of 'return information' was intended to neither enhance nor diminish access now obtainable

under the Freedom of Information Act to statistical studies and compilations of data by the Internal Revenue Service" (122 Cong. Rec. 24012 (1976)).

It is therefore apparent that the Haskell Amendment should not be read to require disclosure of material that would have been treated as confidential under the pre-1976 version of Section 6103. Yet that is precisely petitioner's contention. The regulations that governed pre-1976 disclosures were quite restrictive concerning disclosure to the general public, as opposed to other government agencies. Apart from the Commissioner's general authority to release return information in his discretion, the regulations made no provision at all for disclosures to persons who lacked a material interest in the information by virtue of their relationship to the taxpayer. Compare Treas. Reg. § 301.6103(a)-1(a)(3)(i)(*b*) (1974) with *id.* § 301.6103(a)-1(c)(1)(ii). Under these regulations, petitioner would not have been entitled to the documents at issue here prior to 1976, even after redaction, and there is no reason to suppose that Congress in 1976 sought to bring about the opposite result. Congress was well aware of the scope of disclosure authorized by the pre-1976 regulations (see S. Rep. 94-938, *supra*, at 315-319, 323-324, 326-327, 331, 334-335, 339), and it actually used these regulations as the framework for its inquiry into what disclosures were permissible at the time (*id.* at 318 n.6). In light of Congress's clear intent to restrict rather than to expand disclosure of return information when it amended Section 6103, the Haskell Amendment cannot plausibly be construed to require the redaction and disclosure of all return information to any requesting member of the public.

4. Taking a rather different view of the 1976 legislative history, petitioner argues (Br. 24-26) that

the "sole focus" of the 1976 amendments was preventing the IRS from making excessive disclosures of return information to other government agencies. Petitioner asserts that Congress was unconcerned about disclosure to the general public, and that the Haskell Amendment aimed to guarantee that return information would be released to the requesting public once it had been redacted.

This argument is misconceived. The overriding purpose of the new Section 6103 was to establish that "returns and return information should generally be treated as confidential" (S. Rep. 94-938, *supra*, at 318). Either return information is "confidential" or it is not, and it is not confidential if it is released to the population at large. Congress posed the question whether return information "should be used for *any* purposes other than tax administration" (*id.* at 317 (emphasis added)), and its answer was that such information should not be used "except in those limited situations delineated in the newly amended section 6103 where the committee decided that disclosure was warranted" (*id.* at 318). Congress was aware that pre-1976 regulations severely restricted the public's access to return information, and, to the extent it focused on disclosure to the public, Congress decided that such disclosure should be quite limited, largely in accordance with pre-1976 law. See I.R.C. § 6103(e) (governing disclosure to persons having a material interest); see generally S. Rep. 94-938, *supra*, at 339-342 ("limited disclosures" allowed only where Congress determined that reasons "outweighed any possible invasion of the taxpayer's privacy"; eliminating preexisting authority to disclose whether a person has filed a return). Since Section 6103 on its face bars all disclosure of return information except where expressly permitted, it was hardly necessary

for Congress to concern itself at length with disclosure to the general public. Section 6103, after all, is a confidentiality statute, not a government-in-the-sunshine law.[14]

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[14] Petitioner relies (Br. 29-31) on a statement in the legislative history of the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 701, 95 Stat. 340, to support its reading of the Haskell Amendment. Apart from the fact that such subsequent legislative history ordinarily is entitled to little weight (see, *e.g.*, *Oscar Mayer Co.* v. *Evans*, 441 U.S. 750, 758 (1979); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968)), the meaning that petitioner ascribes to this statement is mistaken. Applying its interpretation of the Haskell Amendment, the Ninth Circuit had held in *Long* v. *Bureau of Economic Analysis*, 646 F.2d 1310, vacated and remanded, 454 U.S. 934 (1981), vacated and remanded, 671 F.2d 1229 (1982), that the IRS was required to disclose to a public requester certain information concerning its criteria for selecting returns for audit. Congress responded immediately to the threat of such a disastrous disclosure by amending Section 6103 to reverse this decision. See I.R.C. § 6103(b)(2) (last sentence). The Conference Report explains that Congress was acting to protect the confidentiality of audit standards, but otherwise was making no change in the existing law under Section 6103. See H.R. Conf. Rep. 97-215, 97th Cong., 1st Sess. 264 (1981). Petitioner seizes upon this statement to support its interpretation of the Haskell Amendment, theorizing that, if "Congress [had] thought that the *Long* decisions had wrongly interpreted the Haskell Amendment, it would have so stated" (Pet. Br. 30). Petitioner's effort to capitalize on what a subsequent Congress did *not* say about a judicial decision that it was hastily acting to *overrule* is quite absurd. As the Seventh Circuit stated in rejecting this identical contention in *King* v. *IRS*, 688 F.2d at 494:

> We are unable to draw from these comments the inference that Congress intended to affirm the "identity test" interpretation of § 6103. The comments, read in context, do not affirm the correctness of the very decision Congress was repudiating, but rather merely state that the rest of § 6103 is not changed by the amendment. What marginal relevance this legislative history possesses in fact cuts against the plaintiff's interpretation. By reiterating that statistical data and other non-return information will remain available to the extent of prior law, the Committee Report creates the negative implication that non-statistical data and return information were protected under prior law, and remain so under the 1981 amendment.

D. The Policies Underlying Section 6103 Support The Court Of Appeals' Conclusion That Redaction Of Identifying Details Is Not Enough To Permit Disclosure Of Return Information

1. Congress acted in 1976 to strengthen the confidentiality protection of Section 6103 because it wanted to assure taxpayers that the information they voluntarily provide to the IRS will not be further disclosed except in the extremely limited situations specifically enumerated in the statute. That overriding policy of protecting taxpayer privacy would be undermined if all return information were required to be disclosed upon removal of identifying details. First, dissemination of information concerning a person's private financial affairs may reasonably be viewed by a taxpayer as some intrusion into his privacy even if he is not identified. Moreover, as this Court has noted, "redaction cannot eliminate all risks of identifiability" (*Department of Air Force* v. *Rose*, 425 U.S. at 381).

The risk of identification despite redaction is particularly troublesome in the case of a FOIA request for tax return information. Tax returns often contain such publicly available information as compensation paid to corporate executives, details of real estate transactions, facts appearing in marriage and

divorce records, and data contained in court files. If an FOIA requester learns such facts from another source, he may well be able to associate information released to him by the IRS with a particular taxpayer, even though the released information itself contains no obvious identifiers. Forcing the IRS to base disclosure decisions on a guess about the scope of the requester's knowledge would produce a risky and unworkable system. And even if it could make extensive inquiry into public sources of information, the IRS could never absolutely guarantee taxpayer privacy. As the Seventh Circuit has observed (*King* v. *IRS*, 688 F.2d at 491-492), the interpretation advanced by petitioner would surely lead to disclosure in some instances to a requester who did have sufficient knowledge to associate the released information with a taxpayer.[15]

Since Congress in passing the 1976 amendments to Section 6103 was concerned above all with taxpayer privacy, it can scarcely be thought to have invited this risk of exposing an individual's confidential financial affairs. It is much more likely that

[15] The IRS, of course, is required to redact "written determinations" and "background file documents" when making those records available for public inspection under Section 6110. Before disclosing such documents, however, the IRS must give the taxpayer whose privacy is implicated 60 days' notice "of intention to disclose [the documents], *together with the proposed deletions.*" I.R.C. § 6110(f)(3)(A) (emphasis added). The taxpayer is thus afforded an opportunity to demonstrate—in court if necessary—that the proposed deletions are inadequate to protect his privacy. In practice, the IRS usually asks the taxpayer who requests the written determination to propose deletions in the first instance. These procedural protections against inadvertent identification are not available under Section 6103.

Congress was prepared to err on the side of caution. The court of appeals' "reformulation" test is thoroughly consistent with that legislative tendency, for it provides "added assurance that a taxpayer's identity will in fact not be disclosed" (Pet. App. 51a).[16]

2. Petitioner argues (Br. 39-42) that redaction and disclosure of return information are necessary to further the general purposes of the Freedom of Information Act. The Freedom of Information Act, however, by its terms "does not apply to matters that are * * * specifically exempted from disclosure by statute" (5 U.S.C. 552(b)(3)), and petitioner does not challenge the court of appeals' holding that Sec-

[16] The problem of inadvertent disclosure is well illustrated by *Willamette Industries, Inc.* v. *United States*, 689 F.2d 865 (9th Cir. 1982), cert. denied, 460 U.S. 1052 (1983), where the court of appeals held that the IRS was required to disclose, with identifying details removed, certain return information from the files of individual taxpayers that concerned valuation of timber in five designated geographic areas. The forestry industry is highly specialized, and the IRS had no way of knowing whether Willamette, a leading member of that industry, had sufficient independent knowledge to enable it to associate with a particular taxpayer some or all of the valuation data disclosed. The court of appeals did not dispute that the disclosure it ordered could lead to identification by "a knowledgable person in the industry," but it nonetheless ordered disclosure because there assertedly was "no specific evidence * * * as to how often this danger of indirect identification might exist" (689 F.2d at 868). This grudging approach to the confidentiality rule of Section 6103 flies in the face of Congress's intent to preserve taxpayer privacy. Because the data disclosed was *in a form* that could be associated with another taxpayer, there was a very real risk that the requester could so associate it, and the data should have remained confidential under a correct interpretation of the Haskell Amendment.

tion 6103 of the Code "gives rise to an exemption under [FOIA] Exemption 3." Pet. App. 30a. Since the instant case concerns the proper construction of a taxpayer *privacy* statute, the FOIA's general policy favoring disclosure is at most tangentially involved here.

The primary thrust of the FOIA, moreover, is to expose government operations to public scrutiny and, in particular, to prevent the development of "secret law." It was in fact this latter consideration that prompted Congress's 1976 enactment of Section 6110, relating to publication of IRS written determinations. But these considerations have little to do with the confidentiality of "return information" described in Section 6103(b)(2)(A). That material consists primarily of personal information submitted by taxpayers or material generated by the IRS in connection with individual returns. This type of information sheds no light on agency practices and policies, and the goals of the FOIA are not advanced by its disclosure. The dominant policy consideration in assessing when and if such data can be released must be the consideration repeatedly voiced by Congress in 1976—preserving the confidentiality of tax return information.

By the same token, there is no merit to petitioner's objection (Br. 39) that the court of appeals' interpretation of the Haskell Amendment "effectively immunizes the IRS from most FOIA requests." Many types of documents prepared by the IRS, which reflect the development of IRS administrative practices and policies, are within the ambit of FOIA and are clearly disclosable. See, *e.g.*, *Taxation With Representation Fund* v. *IRS*, 646 F.2d 666 (D.C. Cir. 1981). Even absent a FOIA request, a vast universe

of IRS documents—such as private letter rulings, technical advice memoranda, determination letters, office memoranda, and general counsel memoranda—is routinely made available by the IRS to tax practitioners in public reading rooms and through reproduction in various commercial services. The IRS has reported that, for calendar year 1986, Section 6103 was invoked as a bar to disclosure in fewer than 25% of the FOIA requests received.[17]

3. Congress has made a judgment that taxpayer return information is material of an unusually private nature and that it should be protected accordingly. This approach is hardly unprecedented. On the contrary, return information in this respect is analogous to census data, which are absolutely protected from public disclosure despite the general provisions of the FOIA. In *Baldrige* v. *Shapiro*, 455 U.S. 345 (1982), this Court rejected the contention that the statutory prohibition on disclosure of census data was inapplicable if identifying details were redacted. Noting that "an accurate census depends in large part on public cooperation" (*id.* at 354), the Court concluded that all raw census data are protected from disclosure, whether or not the data can be associated with a particular person.

The same conclusion must be reached here. Return information is, if anything, more private and sensitive than census data. Like the census, our tax system depends upon citizens' willingness to supply these data voluntarily. As with the census, Congress has estab-

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[17] See IRS Report to the Department of Treasury Concerning the Freedom of Information Act Annual Report to Congress, Due March 1, 1987 for CY 1986 (*available in* IRS public reading room). The report indicates that the IRS received 8,071 valid FOIA requests in 1986 and invoked Section 6103 in its response to 1,641 of those requests.

lished a statutory prohibition against disclosure of return information, subject to limited statutory exceptions. It would frustrate the intent of Congress to transform this prohibition into a mandate for disclosure upon redaction of identifying details, and the court of appeals correctly rejected petitioner's attempt to do so.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JAMES B. MANN
Acting Assistant Attorney General

ALBERT G. LAUBER, JR.
Deputy Solicitor General

ALAN I. HOROWITZ
Assistant to the Solicitor General

JONATHAN S. COHEN
MURRAY S. HORWITZ
Attorneys

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APPENDIX

The Internal Revenue Code (26 U.S.C.) provides in pertinent part:

SEC. 6103. CONFIDENTIALITY AND DISCLOSURE OF RETURNS AND RETURN INFORMATION.

(a) *General Rule.*—Returns and return information shall be confidential, and except as authorized by this title—

(1) no officer or employee of the United States,

(2) no officer or employee of any State, any local child support enforcement agency, or any agency administering a program listed in subsection (1)(7)(D) or any local agency who has or had access to returns or return information under this section, and

(3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii), paragraph (2) or (4)(B) of subsection (m), or subsection (n),

shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

(b) *Definitions.*—For purposes of this section—

(1) *Return.*—The term "return" means any tax or information return, declaration

of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.

(2) *Return information.*—The term "return information" means—

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and

(B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in

section 6110(b)) which is not open to public inspection under section 6110,

but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.

(3) *Taxpayer return information.*—The term "taxpayer return information" means return information as defined in paragraph (2) which is filed with, or furnished to, the Secretary by or on behalf of the taxpayer to whom such return information relates.

(4) *Tax administration.*—The term "tax administration"—

(A) means—

(i) the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes (or equivalent laws and statutes of a State) and tax conventions to which the United States is a party, and

(ii) the development and formulation of federal tax policy re-

lating to existing or proposed internal revenue laws, related statutes, and tax conventions, and

(B) includes assessment, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, or conventions.

(5) *State.*—The term "State" means—

(A) Any of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, the Canal Zone, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau, and

(B) for purposes of subsections (a)(2), (b)(4), (d)(1), (h)(4), and (p) any municipality—

(i) with a population in excess of 2,000,000 (as determined under the most recent decennial United States census data available),

(ii) which imposes a tax on income or wages, and

(iii) with which the Secretary (in his sole discretion) has entered into an agreement regarding disclosure.

(6) *Taxpayer identity.*—The term "taxpayer identity" means the name of a person with respect to whom a return is filed, his

mailing address, his taxpayer identifying number (as described in section 6109), or a combination thereof.

(7) *Inspection.*—The terms "inspected" and "inspection" mean any examination of a return or return information.

(8) *Disclosure.*—The term "disclosure" means the making known to any person in any manner whatever a return or return information.

(9) *Federal agency.*—The term "Federal agency" means an agency within the meaning of section 551(1) of Title 5, United States Code.

(10) *Chief executive officer.*—The term "chief executive officer" means, with respect to any municipality, an elected official and the chief official (even if not elected) of such municipality.

(c) *Disclosure of returns and return information to designee of taxpayer.*—The Secretary may, subject to such requirements and conditions as he may prescribe by regulations, disclose the return of any taxpayer, or return information with respect to such taxpayer, to such person or persons as the taxpayer may designate in a written request for or consent to such disclosure, or to any other person at the taxpayer's request to the extent necessary to comply with a request for information or assistance made by the taxpayer to such other person. However, return information shall not be disclosed to such person or persons if the Secretary determines that such disclosure would seriously impair Federal tax administration.

* * * * *

(e) *Disclosure to Persons Having Material Interest.*—

* * * * *

(7) *Return information.*—Return information with respect to any taxpayer may be open to inspection by or disclosure to any person authorized by this subsection to inspect any return of such taxpayer if the Secretary determines that such disclosure would not seriously impair Federal tax administration.

(f) *Disclosure to Committees of Congress.*—

(1) *Committee on ways and means, committee on finance, and joint committee on taxation.*—Upon written request from the chairman of the Committee on Ways and Means of the House of Representatives, the chairman of the Committee on Finance of the Senate, or the chairman of the Joint Committee on Taxation, the Secretary shall furnish such committee with any return or return information specified in such request, except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

(2) *Chief of staff of joint committee on taxation.*—Upon written request by the Chief of Staff of the Joint Committee on Taxation, the Secretary shall furnish him

with any return or return information specified in such request. Such Chief of Staff may submit such return or return information to any committee described in paragraph (1), except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

* * * * *

(4) *Agents of committees and submission of information to senate or house of representatives.*—

(A) *Committee described in paragraph (1).*—Any committee described in paragraph (1) or the Chief of Staff of the Joint Committee on Taxation shall have the authority, acting directly, or by or through such examiners or agents as the chairman of such committee or such chief of staff may designate or appoint, to inspect returns and return information at such time and in such manner as may be determined by such chairman or chief of staff. Any return or return information obtained by or on behalf of such committee pursuant to the provisions of this subsection may be submitted by the committee to the Senate or the House of Representatives, or to both. The Joint Committee on Taxation may also submit such return or return information to

any other committee described in paragraph (1), except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

(B) *Other committees.*—Any committee or subcommittee described in paragraph (3) shall have the right, acting directly, or by or through no more than four examiners or agents, designated or appointed in writing in equal numbers by the chairman and ranking minority member of such committee or subcommittee, to inspect returns and return information at such time and in such manner as may be determined by such chairman and ranking minority member. Any return or return information obtained by or on behalf of such committee or subcommittee pursuant to the provisions of this subsection may be submitted by the committee to the Senate or the House of Representatives, or to both, except that any return or return information which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer, shall be furnished to the Senate or the House of Representatives only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.

* * * * *

(i) *Disclosure to Federal Officers or Employees for Administration of Federal Laws Not Relating to Tax Administration.*—

* * * * *

(7) *Comptroller general.*—

(A) *Returns available for inspection.*—Except as provided in subparagraph (C), upon written request by the Comptroller General of the United States, returns and return information shall be open to inspection by, or disclosure to, officers and employees of the General Accounting Office for the purpose of, and to the extent necessary in, making—

(i) an audit of the Internal Revenue Service or the Bureau of Alcohol, Tobacco and Firearms which may be required by section 713 of title 31, United States Code, or

(ii) any audit authorized by subsection (p)(6),

except that no such officer or employee shall, except to the extent authorized by subsection (f) or (p)(6), disclose to any person, other than another officer or employee of such office whose official duties require such disclosure, any return or return information described in section 4424(a) in a form which can be associated with, or otherwise identify,

directly or indirectly, a particular taxpayer, nor shall such officer or employee disclose any other return or return information, except as otherwise expressly provided by law, to any person other than such other officer or employee of such office in a form which can be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

(B) *Audits of other agencies.*—

(i) *In general.*—Nothing in this section shall prohibit any return or return information obtained under this title by any Federal agency (other than an agency referred to in subparagraph (A)) for use in any program or activity from being open to inspection by, or disclosure to, officers and employees of the General Accounting Office if such inspection or disclosure is—

(I) for purposes of, and to the extent necessary in, making an audit authorized by law of such program or activity, and

(II) pursuant to a written request by the Comptroller General of the United States to the head of such Federal agency.

* * * * *

(iv) *Certain restrictions made applicable.*—The restrictions contained in subparagraph (A) on the disclosure of any returns or return information open to inspection or disclosed under such subparagraph shall also apply to returns and return information open to inspection or disclosed under this subparagraph.

* * * * *

(j) *Statistical Use.*—

(1) *Department of commerce.*—Upon request in writing by the Secretary of Commerce, the Secretary shall furnish—

(A) such returns, or return information reflected thereon, to officers and employees of the Bureau of the Census, and

(B) such return information reflected on returns of corporations to officers and employees of the Bureau of Economic Analysis,

as the Secretary may prescribe by regulation for the purpose of, but only to the extent necessary in, the structuring of censuses and national economic accounts and conducting related statistical activities authorized by law.

(2) *Federal trade commission.*—Upon request in writing by the Chairman of the Federal Trade Commission, the Secretary shall furnish such return information re-

flected on any return of a corporation with respect to the tax imposed by chapter 1 to officers and employees of the Division of Financial Statistics of the Bureau of Economics of such commission as the Secretary may prescribe by regulation for the purpose of, but only to the extent necessary in, administration by such division of legally authorized economic surveys of corporations.

(3) *Department of treasury.*—Returns and return information shall be open to inspection by or disclosure to officers and employees of the Department of the Treasury whose official duties require such inspection or disclosure for the purpose of, but only to the extent necessary in, preparing economic or financial forecasts, projections, analyses, and statistical studies and conducting related activities. Such inspection or disclosure shall be permitted only upon written request which sets forth the specific reason or reasons why such inspection or disclosure is necessary and which is signed by the head of the bureau or office of the Department of the Treasury requesting the inspection or disclosure.

(4) *Anonymous form.*—No person who receives a return or return information under this subsection shall disclose such return or return information to any person other than the taxpayer to whom it relates except in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

* * * * *

(p) *Procedure and Recordkeeping.*—

* * * * *

(4) *Safeguards.*—Any Federal agency described in subsection (h)(2), (h)(6), (i)(1), (2), (3), or (5), (j)(1) or (2), (*l*)(1), (2), (3), (5), (10), or (11), or (o)(1), the General Accounting Office, or any agency, body or commission described in subsection (d), (i)(3)(B)(i), or (*l*)(6), (7), (8) or (9) shall, as a condition for receiving returns or return information—

(A) establish and maintain, to the satisfaction of the Secretary, a permanent system of standardized records with respect to any request, the reason for such request, and the date of such request made by or of it and any disclosure of return or return information made by or to it;

(B) establish and maintain, to the satisfaction of the Secretary, a secure area or place in which such returns or return information shall be stored;

(C) restrict, to the satisfaction of the Secretary, access to the returns or return information only to persons whose duties or responsibilities require access and to whom disclosure may be made under the provisions of this title;

(D) provide such other safeguards which the Secretary determines (and which he prescribes in regulations) to be necessary or appropriate to protect the confidentiality of the returns or return information;

(E) furnish a report to the Secretary, at such time and containing such information as the Secretary may prescribe, which describes the procedures established and utilized by such agency, body, or commission or the General Accounting Office for ensuring the confidentiality of returns and return information required by this paragraph; and

(F) upon completion of use of such returns or return information—

> (i) in the case of an agency, body, or commission described in subsection (d), * * * return to the Secretary such returns or return information (along with any copies made therefrom) or make such returns or return information undisclosable in any manner and furnish a written report to the Secretary describing such manner; and
>
> (ii) in the case of an agency described in subsections (h)(2) * * * or (o)(1), or the General Accounting Office, either—
>
> > (I) return to the Secretary such returns or return information (along with any copies made therefrom),
> >
> > (II) otherwise make such returns or return information undisclosable, or
> >
> > (III) to the extent not so returned or made undisclosable, ensure the conditions of subparagraphs (A), (B), (C), (D), and (E) of the paragraph continue to be met with respect to such returns or return information,

except that the conditions of subparagraphs (A), (B), (C), (D), and (E) shall cease to apply with respect to any return or return information if, and to the extent that, such return or return information is disclosed in the course of any judicial or administrative proceeding and made a part of the public record thereof. If the Secretary determines that any such agency, body, or commission or the General Accounting Office has failed to, or does not, meet the requirements of this paragraph, he may, after any proceedings for review established under paragraph (7), take such actions as are necessary to ensure such requirements are met, including refusing to disclose returns or return information to such agency, body, or commission or the General Accounting Office until he determines that such requirements have been or will be met. In the case of any agency which receives any mailing address under subsection (m)(2) or (4) and which discloses any such mailing address to any agent, this paragraph shall apply to such agency and each such agent (except that, in the case of an agent, any report to the Secretary or other action with respect to the Secretary shall be made or taken through such agency).

* * * * *

SEC. 6108. STATISTICAL PUBLICATIONS AND STUDIES.

(a) *Publication or Other Disclosure of Statistics of Income.*—The Secretary shall prepare and publish not less than annually statistics reasonably available with respect to the operations of the internal revenue laws, including classifications of taxpayers and of income, the amounts claimed or allowed as deductions, exemptions, and credits, and any other facts deemed pertinent and valuable.

(b) *Special Statistical Studies.*—The Secretary may, upon written request by any party or parties, make special statistical studies and compilations involving return information (as defined in section 6103(b)(2)) and furnish to such party or parties transcripts of any such special statistical study or compilation. A reasonable fee may be prescribed for the cost of the work or services performed for such party or parties.

(c) *Anonymous Form.*—No publication or other disclosure of statistics or other information required or authorized by subsection (a) or special statistical study authorized by subsection (b) shall in any manner permit the statistics, study, or any information so published, furnished, or otherwise disclosed to be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

SEC. 6110. PUBLIC INSPECTION OF WRITTEN DETERMINATIONS.

(a) *General rule.*—Except as otherwise provided in this section, the text of any written determination and any background file document

relating to such written determination shall be open to public inspection at such place as the Secretary may by regulations prescribe.

(b) *Definitions.*—For purposes of this section—

(1) *Written determination.*—The term "written determination" means a ruling, determination letter, or technical advice memorandum.

(2) *Background file document.*—The term "background file document" with respect to a written determination includes the request for that written determination, any written material submitted in support of the request, and any communication (written or otherwise) between the Internal Revenue Service and persons outside the Internal Revenue Service in connection with such written determination (other than any communication between the Department of Justice and the Internal Revenue Service relating to a pending civil or criminal case or investigation) received before issuance of the written determination.

(3) *Reference and general written determinations.*—

(A) *Reference written determination.*—The term "reference written determination" means any written determination which has been determined by the Secretary to have significant reference value.

(B) *General written determination.*—The term "general written determination" means any written determination

other than a reference written determination.

(c) *Exemptions From Disclosure.*—Before making any written determination or background file document open or available to public inspection under subsection (a), the Secretary shall delete—

(1) the names, addresses, and other identifying details of the person to whom the written determination pertains and of any other person, other than a person with respect to whom a notation is made under subsection (d) (1), identified in the written determination or any background file document;

(2) information specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy, and which is in fact properly classified pursuant to such Executive order;

(3) information specifically exempted from disclosure by any statute (other than this title) which is applicable to the Internal Revenue Service;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(6) information contained in or related to examination, operating, or condition reports prepared by, or on behalf of, or for use of an agency responsible for the regulation or supervision of financial institutions; and

(7) geological and geophysical information and data, including maps, concerning wells.

The Secretary shall determine the appropriate extent of such deletions and, except in the case of intentional or willful disregard of this subsection, shall not be required to make such deletions (nor be liable for failure to make deletions) unless the Secretary has agreed to such deletions or has been ordered by a court (in a proceeding under subsection (f) (3)) to make such deletions.

• • • • •

(f) *Resolution of disputes relating to disclosure.*—

(1) *Notice of intention to disclose.*—The Secretary shall upon issuance of any written determination, or upon receipt of a request for a background file document, mail a notice of intention to disclose such determination or document to any person to whom the written determination pertains (or a successor in interest, executor, or other person authorized by law to act for or on behalf of such person).

(2) *Administrative remedies.*—The Secretary shall prescribe regulations establishing administrative remedies with respect to—

(A) requests for additional disclosure of any written determination or any background file document, and

(B) requests to restrain disclosure.

(3) *Action to restrain disclosure.*—

(A) *Creation of remedy.*—Any person—

(i) to whom a written determination pertains (or a successor in interest, executor, or other person authorized by law to act for or on behalf of such person), or who has a direct interest in maintaining the confidentiality of any such written determination or background file document (or portion thereof),

(ii) who disagrees with any failure to make a deletion with respect to that portion of any written determination or any background file document which is to be open or available to public inspection, and

(iii) who has exhausted his administrative remedies as prescribed pursuant to paragraph (2),

may, within 60 days after the mailing by the Secretary of a notice of intention to disclose any written determination or background file document under paragraph (1), together with the proposed deletions, file a petition in the United States Tax Court (anonymously, if appropriate) for a determination with respect to that portion of such written determination or background file document which is to be open to public inspection.

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REPLY BRIEF

No. 86-472

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioner,

v.

INTERNAL REVENUE SERVICE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

MICHAEL LEE HERTZBERG
275 Madison Avenue
New York, New York 10016
(212) 679-1167

ERIC M. LIEBERMAN*
ELLEN J. WINNER
RABINOWITZ, BOUDIN, STANDARD, KRINSKY & LIEBERMAN, P.C.
740 Broadway, 5th Floor
New York, New York 10003
(212) 254-1111

Counsel for Petitioner

*Counsel of Record

KENDRICK L. MOXON
Of Counsel

September, 1987

TABLE OF CONTENTS

Table of Authorities

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REPLY BRIEF FOR THE PETITIONER

Introduction

The brief for respondent Internal Revenue Service ("IRS") is most notable for the important issues which it addresses superficially, or avoids altogether. Thus, in much the same manner as the *en banc* majority of the court of appeals below, the IRS focuses on what it believes the Haskell Amendment does *not* mean, rather than finding clear examples of what the Amendment *does* mean and support for its own interpretation. Indeed, to the extent that the IRS articulates its interpretation at all, it apparently adheres to the extremely narrow construction of the Haskell Amendment which was rejected by the court of appeals.[1]

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[1] For example, the IRS states: "[T]he Amendment *appears* to have been designed only to assure the disclosability of statistics and compilations of data akin to those addressed by Section 6108." (Resp. Br. 12, emphasis supplied.) The *en banc* majority of the

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The IRS also neglects to explain from what form properly "reformulated" data must originate. *See* Pet. Br. 20 and n. 20. This leaves unclarified exactly what type of data may be released under the standard provided by the court of appeals, and reinforces the strong impression that the release of any data which cannot be associated with or identify a taxpayer may arbitrarily turn upon how the IRS happens to maintain information in its files.

Further, the IRS virtually ignores the fact that the court of appeals panel held that 26 U.S.C. § 6103(b)(2), which includes the Haskell Amendment, is a Freedom of Information Act ("FOIA") exemption statute.[2] When the IRS addresses FOIA at all, it suggests that there is an inherent incompatability between the statute and the release of information from IRS files, despite the fact that the court of appeals found FOIA and § 6103 to be "entirely harmonious" and "quite literally made for each other." (Pet. App. 30a.)[3] The IRS' attempt to downplay FOIA disregards the axiom that FOIA exemptions should be narrowly construed, and the fact that the Haskell Amendment issue arose herein in the context of the petitioner Church of Scientology of California's ("Church's") FOIA request.

Finally, throughout its brief the IRS mischaracterizes or misstates the Church's interpretation of the Haskell Amendment. Because such distortion could fundamentally affect perception of all of the Church's arguments and responses, we will first demonstrate how the IRS has incorrectly framed our position.

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court of appeals forcefully rejected this very argument. (Pet. App. 52a-56a and n.3.) [References to "Resp. Br." are to the Brief for the Respondent, references to "Pet. Br." are to the Brief for the Petitioner and references to "Pet. App." are to the Appendix to the Church's Petition For a Writ of Certiorari.]

[2] 5 U.S.C. § 552(b)(3).

[3] The IRS' statement that *petitioner* "does not challenge" the court of appeals' holding that § 6103 is a FOIA (b)(3) exemption statute is disingenuous in the extreme. (Resp. Br. 43-44.) It was the IRS which vigorously argued below that § 6103 was *not* a FOIA (b)(3) exemption statute. The Church steadfastly maintained that § 6103 *was* a (b)(3) exemption statute, and prevailed in the court of appeals on this issue.

POINT I

The IRS Has Mischaracterized The Church's Interpretation Of The Haskell Amendment.

The IRS asserts that the Church views the Haskell Amendment as a "directive" to alter documents so that they may be disclosed. (Resp. Br. 10, 22.) The Church has argued no such thing. In fact the Church has made clear that while the Haskell Amendment functions as an integral part of the *definition* of "return information," the "duty to delete exempt information and to segregate and release the remainder of a document is found in the Freedom of Information Act, 5 U.S.C. § 552(b)." (Pet. Br. 21.) Thus the Haskell Amendment does not "*requir*[*e*] redaction and disclosure" (Resp. Br. 18, emphasis supplied), but rather assists in determining what reasonably segregable data may be nonexempt and hence disclosable pursuant to a proper FOIA request. The IRS' effort to ascribe a radical interpretation of the Haskell Amendment to the Church must fail, as the Church has repeatedly stressed that the redaction and disclosure process arises in the context of a FOIA request such as the one in the instant case.

The IRS also understates the Church's view of what measures are necessary to protect taxpayer confidentiality before data may be released under FOIA. For example, the IRS asserts that "mere redaction of a taxpayer's name and social security number from (for example) a list of her charitable contributions does not convert that data into a *form* in which it cannot be associated with her." (Resp. Br. 23, emphasis in original.) However, the Church has emphasized that whatever steps are necessary must be taken to ensure that data neither identifies nor can be *associated* with a taxpayer as the Haskell Amendment specifies,[4]

[4] Accordingly, the Church's references throughout its briefs to "identifying details," "identifying data" or "identifying infor-

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and that in this respect the Haskell Amendment sets forth a prophylactic rule. (Pet. Br. 19 n. 19.)

In sum, the Church's interpretation of the Haskell Amendment clearly requires that *any and all* measures be taken to protect taxpayer confidentiality before any reasonably segregable data may be disclosed under FOIA, and the IRS' repeated suggestions to the contrary are highly misleading.[5]

POINT II

The IRS' Statutory Arguments Fail To Discredit The Church's Interpretation Of The Haskell Amendment.

1. The IRS argues that 26 U.S.C. § 6103 is a confidentiality statute, and therefore deletion can never render § 6103(b)(2) data disclosable under FOIA. (Resp. Br. 19.) The IRS reads § 6103 as if the Haskell Amendment were not an integral part of the statute. The general rule, set out in § 6103(a), is that "[r]eturns and return information shall be confidential," and the statute prohibits disclosure "except as authorized by this title." 26 U.S.C. § 6103(a). However, the Haskell Amendment, which follows, excludes from the definition of return information "data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer." 26 U.S.C. § 6103(b). Thus, it furnishes an explicit frame-

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mation" clearly refer to any information which can be "associated with, or otherwise identify, directly or indirectly, a particular taxpayer," as defined in the Haskell Amendment.

[5] Because the Haskell Amendment so scrupulously protects taxpayer privacy, it is unfair indeed for the IRS to characterize it as "turn[ing § 6103 . . .] upside down" or creating a "fundamental change" in the statutory scheme. (Resp. Br. 10, 18, 32.) Section 6103 was drafted to protect taxpayer confidentiality. The disclosure of nonidentifying information in no way conflicts with this statutory purpose.

work by which nonidentifying data is excluded from the confidentiality requirement.[6]

Further, the IRS' interpretation of § 6103 renders that statute irreconcilable with FOIA. While FOIA precludes disclosure of information under exemption statutes which meet the requirements of 5 U.S.C. § 552(b)(3), "reasonably segregable" nonexempt data must be released. 5 U.S.C. § 552(b).[7] However, the IRS' interpretation of the Haskell Amendment does not allow for the possibility of any segregable nonexempt data under § 6103.

2. The IRS argues that the Church's interpretation of § 6103 would effectively nullify the protection for trade secrets afforded by 26 U.S.C. § 6110. According to the IRS, if segregation of nonidentifying or associating material were permitted, portions of trade secrets could be released under § 6103(b)(2), even though disclosure of trade secrets is barred under § 6110. (Resp. Br. 20-21.)

This argument applies equally to the court of appeals' "reformulation" theory supported by the IRS. Disclosure of a "reformulated" trade secret would create the same apparent anomaly with § 6110 as would release of a trade secret with identifying and associating material deleted. Thus, at best the IRS' point rests upon the kind of insig-

[6] The IRS also argues that Congress' use of exclusionary rather than inclusionary language in the Haskell Amendment bolsters its interpretation of the meaning of § 6103. (Resp. Br. 20.) As the Church has observed (Pet. Br. 36 and n.33), the structure of the statute is fully accounted for by the legislative process by which the Haskell Amendment was added language that had already been drafted. In such a case, redrafting of the earlier language would have been a superfluous exercise. Although the IRS suggests an alternative draft, it is not functionally distinct from the one enacted.

[7] The deletion and segregation provision predates § 6103, having been added to FOIA by Pub.L. 93-502 § (2)(c) effective November 21, 1974. The case law had already read such a requirement into FOIA. *See EPA* v. *Mink*, 410 U.S. 73, 91 (1973); *Grumman Aircraft Engineering Corp.* v. *Renegotiation Bd.*, 425 F.2d 578, 580 (D.C. Cir. 1970); *Wellford* v. *Hardin*, 315 F. Supp. 768, 770 (D.D.C. 1970).

nificant linguistic superfluity which would exist under any interpretation of the Haskell Amendment.

Further, FOIA contains an explicit exemption for trade secrets. 5 U.S.C. § 552(b)(4).[8] Therefore, absolutely no danger exists that trade secrets could ever be revealed under the Church's interpretation of § 6103(b)(2).[9]

3. The IRS attributes to the words "in a form" a generalized requirement of some vaguely defined "reformulation," (Resp. Br. 24) that neither the court of appeals nor the IRS makes any serious effort to define. (Pet. Br. 18-21.) It also reiterates a misstatement in the court of appeals' decision to the effect that subsections 6103(i)(7)(A) and (j)(4), which also contain the words "in a form," require that certain government officials release only reformulated data. (Pet. App. 51a-52a; Resp. Br. 25 n.9.) This is clearly *not* the case. (Pet. Br. 36-37.) The IRS has chosen to ignore this, and has merely repeated the court's error.

4. The IRS claims that the fact that the Haskell Amendment is appended only to the definition of "return information," and not to the definition of "return," somehow demonstrates that Congress felt that the deletion of all identifying data would be insufficient to protect taxpayer privacy. (Resp. Br. 25-26.) As with many of the IRS' responses,

[8] The FOIA exemption applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). The "privileged and confidential" requirement applies only to commercial or financial information. Trade secrets are exempt without any further showing. *Brockway* v. *Department of Air Force*, 518 F.2d 1184, 1188 (8th Cir. 1975); *National Parks and Conservation Asso.* v. *Morton*, 498 F.2d 765, 766 (D.C. Cir. 1974).

[9] Even if FOIA did not contain this express exemption for trade secrets, trade secrets would arguably always be viewed as nondisclosable return information, since they are used in business and thus can be identified with the user. It is therefore difficult to envision circumstances in which a trade secret could not be "associated with, or otherwise identify, directly or indirectly" the holder of the secret, and thus not be exempt from disclosure under § 6103.

this argument is equally applicable to its own reformulation position. The IRS might just as well have asked why, if Congress had thought its taxpayer privacy concerns were adequately served by reformulation, it did not make tax returns, as well as return information, disclosable upon reformulation.[10]

5. The IRS argues that language in 26 U.S.C. § 6103(f)(1), (2), (4)(A) and (4)(B) which appears to imply the existence of nonidentifying return information results in a superfluity. (Resp. Br. 27.) The IRS ignores the reality of the legislative process whereby the Haskell Amendment was adopted after § 6103(f) was already drafted. While this does render some of the language of § 6103(f) superfluous, it certainly does not, as the IRS suggests, alter the import of the Amendment.[11] Addressing this very question, the Ninth Circuit noted: "Given the choice between adopting the explicit language of one section and an inconsistent implication of another, we chose the explicit language, particularly where, as here, it is consistent with the overall purpose of the Act." *Long* v. *IRS*, 596 F.2d 362, 368 (9th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980).

6. The IRS argues that the Church's interpretation of the Haskell Amendment leads to an "untenable result" whereby in theory certain information could be withheld from a first-party requester on § 6103(c) and (e)(7) grounds that disclosure would seriously impair federal tax administration, while the same information could be disclosed to a third-party requester so long as identifying details were removed. (Resp. Br. 28.) This argument is specious. First-party requesters are informed requesters *per se*. They seek their own files and thus know to whom

[10] The IRS' argument that a tax return cannot be "reformulated" (Resp. Br. 26 n.10) is surprising in view of its release of allegedly reformulated tax returns in the annual tax models it releases. (Resp. Br. 36 n.13.)

[11] The insubstantiality of this argument is reflected by the fact that the language of § 6103(f), upon which the IRS relies, also implies that there is such a thing as a nonidentifying tax return, an obvious impossibility.

the information in those files pertains. Obviously certain taxpayers, for example those involved in litigation with the IRS, could easily obtain information which would impair tax administration if they obtained their own files. Such a situation is the clear rationale for application of subsections 6103(c) and (e)(7) by the Commissioner. In contrast, a third-party requester may only receive information which cannot be associated with or identify any particular taxpayer, either directly or indirectly. Such data could never impair tax administration since it could not be linked to any particular case.

7. The IRS focuses upon the different methods by which § 6110 and § 6103 protect taxpayer confidentiality. (Resp. Br. 28-30.) These differences actually support the Church's position. In enacting § 6110, Congress expressly stated its intention to replace FOIA. S.Rep. No. 94-938, 94th Cong. 2nd Sess., pp. 305-06, *reprinted in* [1976] U.S. Code Cong. & Admin. News, pp. 3439, 3735. Therefore, that statute contains express language making it the exclusive remedy for disclosure or nondisclosure of written determinations. 26 U.S.C. § 6110(*l*).[12] The absence in § 6103 of an "exclusive remedy" provision such as that in § 6110(*l*) supports the Church's position that Congress intended FOIA to continue to play a role in disclosure and nondisclosure determinations under § 6103. This is particularly clear since the two provisions were enacted simultaneously. In sum, since Congress expected FOIA to co-exist with § 6103, it had no need to draft a comprehensive procedural scheme regarding challenges to nondisclosure and to disclosure, as it did in § 6110.[13]

[12] Even though the IRS has not quarreled with the Church's description of the circumstances which invoke the procedural scheme (Pet. Br. 38), we note that the IRS is precluded from releasing names in connection with written determinations in any circumstances.

[13] At the time § 6103 was enacted, FOIA had been in effect for ten years. Through the amendment process, it had gone through three major legislative refinements. A large body of case law existed which clarified procedural and substantive aspects of the

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8. The Church cited two instances where the IRS contemporaneously construed § 6103(b)(2) consistently with the Church's interpretation of the Haskell Amendment. (Pet. Br. 31-32.) The IRS' attempt to rebut these examples consists of meaningless semantic exercises.

First, the Church referred to post-enactment testimony of IRS officials that FOIA compelled disclosure of a list of inquiries made to the IRS by members of Congress on behalf of their constituents, with identifying data deleted. (Pet. Br. 32.) The IRS argues that such a list would be disclosable solely because of the happenstance that the "reformulated" list had been compiled by the IRS prior to receipt of a FOIA request. (Resp. Br. 30-31 n.12.) It is unclear whether the IRS is correct that the list referred to would be a reformulation, since the court of appeals suggests that copying the same data onto a different piece of paper would not be a reformulation. (Pet. App. 57a n.4.) Further, even if it were a reformulation, the *identical* information would not be disclosable in the IRS' view, if it had not been fortuitously assembled by the IRS on a "list." Such a result highlights the arbitrary manner in which disclosure is permitted under the IRS' theory, and undermines the IRS' fundamental claim that reformulation necessarily provides "added assurance that a taxpayer's identity will in fact not be disclosed." (Resp. Br. 43.) Clearly, a taxpayer is protected if all material which might identify or be associated with him is deleted, regardless of whether the remaining redacted and segregated information is subsequently recopied by the IRS onto a list.[14]

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statute. FOIA lawsuits were available to compel disclosure, and "reverse FOIA" lawsuits to enjoin disclosure. Because procedures which had already proved themselves to be adequate were in place, there was no need for Congress to duplicate the process in § 6103 itself.

[14] The IRS also claims that it later abandoned the proposed disclosure which was the subject of the congressional testimony, "largely because of its concern that the disclosure would be of questionable legality under the new Section 6103." (Resp. Br. 31 n.12.) This bald assertion is made without citation to any source, and therefore should be disregarded.

The Church also established that in responding to its FOIA request in the instant case, the IRS deleted information which identified third parties, claimed a § 6103(b)(2) exemption as to those provisions of the documents which were withheld, and released the remaining portion of the documents. (Pet. Br. 32.) The IRS answers by asserting that "all third-party return information was deleted prior to disclosure, not, as petitioner's interpretation would require, that the return information was being disclosed with identifying details removed." (Resp. Br. 30-31 n.12.) The distinction which the IRS seeks to draw obscures the undisputed fact that at an early stage of this litigation, the IRS deleted third-party identifying information in accordance with § 6103 (b)(2), and segregated and disclosed the remaining nonidentifying data in the very manner which the Church asserts is required by the application of FOIA and the Haskell Amendment.

9. Citing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the IRS casually suggests that if there is any "uncertainty" about the meaning of the Haskell Amendment, deference should be given to its "agency interpretation." (Resp. Br. 30 n.12.) However, the court of appeals majority concluded that the IRS had never advanced "the sort of clear and inconsistent agency view . . . that must be given deference," and documented in detail how the IRS' brief and oral argument below reflected shifting theories. (Pet. App. 54a-56a n.3.)

Even at this late date the IRS seems to vacillate between endorsing the "reformulation" standard adopted by the court of appeals, and the narrower interpretation of the Haskell Amendment, limited to statistical materials, which was rejected by the court (Resp. Br. 12) because it does not allow for disclosure of the tax model. (Pet.-App. 54a-56a n.3.) In fact this is not the only example of diametrically opposite positions maintained by the IRS in this litigation. In the course of releasing redacted documents to the Church during the administrative process, the IRS relied upon decisions holding that § 6103 qualifies as

a FOIA subsection (b)(3) statute. (Joint Appendix 44a-45a, 56a.) Yet in the court of appeals the IRS vigorously argued that § 6103 supercedes FOIA, and is *not* a subsection (b)(3) exemption statute. *See* Brief for Appellee at 10-17.

In sum, for the reasons stated by the court of appeals and the additional factors noted by the Church, no deference should be accorded the IRS' present interpretation of § 6103 since there has been no consistent agency position.

POINT III

The Legislative History Of § 6103 And Its Relationship With The Freedom Of Information Act Refute The IRS' Interpretation Of The Haskell Amendment.

The IRS claims that the Church's interpretation of the Haskell Amendment would expand disclosure of tax data beyond the practice under prior law, and that such a result is contrary to the purpose of the 1976 revision of § 6103. (Resp. Br. 18, 37-40.) The IRS simply overreaches in this argument.[15] First, Senator Haskell made clear that his Amendment was not intended to diminish the release of data.[16] Second, case law indicates that prior to enactment of the Tax Reform Act of 1976 there was apparently no uniform IRS practice governing release of tax-related data, and that in fact when the IRS or the courts sought to protect taxpayer confidentiality in released documents, they did so in a manner consistent with the Church's interpretation of the Haskell Amendment. Moreover, on repeated occasions courts rejected the IRS' prior regulatory

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[15] The IRS never made this argument in the court of appeals, nor did the *en banc* majority rely upon it in support of its opinion.

[16] Senator Haskell stated that the purpose of the Amendment was "to neither enhance nor diminish access now obtainable under the Freedom of Information Act to statistical studies and compilations of data by the Internal Revenue Service." 122 Cong. Rec. 24012 (1976). He referred explicitly to the continuation of disclosure of such data "to the extent allowed under present law" and "under its current practice." *Id.*

scheme, under which the IRS here argues that virtually all tax data was nondisclosable before 1976.

The IRS' brief is oddly silent on the IRS' actual practice with respect to the release of tax information prior to 1976, despite Senator Haskell's specific reference to maintaining "current practice" and "present law" in the legislative history. 122 Cong. Rec. 24012. Rather, the IRS refers only to its pre-1976 regulatory scheme, which purported to give it discretion to deny totally disclosure to persons who did not have a material interest by virtue of their relationship with the taxpayer, in the information sought. (Resp. Br. 15, 38, 39.) However, on at least some occasions prior to enactment of the Tax Reform Act of 1976, it was IRS practice to delete identifying data and to release the segregable remaining data in the relevant document, as the Church maintains is required.

1. The tax model, the one example to which Senator Haskell specifically referred in the legislative history, is a strong example of pre-1976 release of tax return information with identifying details deleted. The Church's brief demonstrates a fundamental flaw in the *en banc* majority's mistaken reliance upon the "tax model" as an example of a "reformulated," and hence disclosable, document. (Pet. Br. 27-29.) Following the issuance of its opinion, the court of appeals learned that when the Haskell Amendment became law, the tax model was in fact not reformulated data, but rather contained "an actual return with identifying details eliminated." (Pet. App. 90a-91a.) The significance is that Senator Haskell had offered the tax model as a specific example of information which could continue to be disclosed pursuant to FOIA, and the true nature of the tax model at that time conforms with the Church's interpretation of the Haskell Amendment.

The IRS seeks to avoid this compelling support for the Church's position by obfuscating the meaning of the tax model, and then discrediting Senator Haskell and his colleagues. First, the IRS masks its begrudging acknowledgement that the tax model did indeed contain "raw data . . .

of a particular taxpayer . . . without identifying details." [17] (Resp. Br. 36 n. 13.) Next, the IRS suggests that Senator Haskell's reference to the tax model was "innocuous" and that neither he nor Congress "had any idea" of the true nature of the tax model. *Id.* Finally, the IRS speculates that "it is more reasonable to assume" that Senator Haskell understood the tax model to "exemplify" the limited category of tax information which the IRS urges is disclosable. *Id.*

The IRS' effort to belittle Senator Haskell's reference to the tax model during the legislative process must fail. Surely when the sponsor of an amendment provides a specific example to illustrate the intent of proposed statutory language, such reference cannot be termed "innocuous." [18] Further, the IRS indulges in unwarranted and self-serving conjecture when it "assumes" that Senator Haskell and his colleagues did not fully understand the tax model. Such inappropriate surmise merely highlights the significance of Senator Haskell's statement, and the IRS' inability to explain it away.

2. Another striking example of IRS release of tax information with identifying details deleted is found in *Tax Reform Research Group* v. *IRS*, 419 F. Supp. 415 (D.D.C. 1976). In that case, decided before the Tax Reform Act of 1976 was enacted, the plaintiffs sought information which would reveal improper IRS conduct in connection with White House pressure on the IRS to take favorable or adverse tax action against individuals, depending upon whether they were "friends" or "enemies." 419 F. Supp.

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[17] The IRS' references to theoretical "manipulation" of the tax model are purely diversionary. The fact is that the court of appeals amended its opinion after an *amicus curiae* informed the court that the tax model was not a reformulated document. (Pet. App. 91a.)

[18] Indeed, in the court of appeals the IRS argued that "[b]ecause it is a statement of the sponsor of the amendment and there is no other legislative history, [Senator Haskell's] comment deserves to be accorded considerable weight in interpreting the meaning of the amendment" (citations omitted). Supplemental Brief for the Appellees at 11.)

at 417. In the course of the decision, the court described the IRS' voluntary disclosure of redacted information from documents for which it asserted a FOIA(b)(3) exemption based on § 6103 as it then existed. Under the current § 6103 (b)(2), the redacted portions would indisputably qualify as return information.[19] There is nothing in the court's discussion of the facts which suggests that the IRS' voluntary redaction of identifying data from return information in that case was unique or even unusual.[20]

3. The IRS maintains that under its pre-1976 regulatory scheme, it could bar virtually all third-party disclosure of tax related data. (Resp. Br. 15, 38.) In fact, in a number of instances courts rejected that very claim, ruling that the IRS must disclose segregable portions of documents which were not actual tax returns. The courts rebuffed attempts by the IRS to expand, by regulation, the meaning of "tax return" which appeared in the statute.[21]

Thus, for example, in *Tax Reform Research Group* v. *IRS,* 419 F. Supp. 415 (D.D.C. 1976), the court rejected a FOIA (b)(3) exemption claim for various communications between the White House and IRS regarding the tax status of named individuals. These materials would clearly qualify as "tax return information" under the current § 6103(b)(2). Other courts, including three circuit courts

[19] For example, the IRS voluntarily released three documents which "detail what the taxpayers were being investigated for and what the results of those investigations show, and the contemplated future action of the I.R.S. . . . with the names of the taxpayers and certain other identifying data deleted." 419 F. Supp. at 419.

[20] Prior to 1976 the IRS also publicly released tax return information with identifying details deleted in furtherance of tax policy discussions. Several examples of such releases are described in the brief of *amici curiae* American Civil Liberties Union, *et al.*, submitted to this Court in this case on April 27, 1987, at pp. 24-25.

[21] In the regulations, the IRS had created an expansive definition of "returns," which included (a) "[i]nformation returns, schedules, lists, and other written statements filed by or on behalf of the taxpayer . . . " and (b) "[o]ther records, reports, information received orally or in writing, factual data, documents, papers, abstracts, memoranda, or evidence taken, or any portion thereof, relating to the items included under (a). . . . "

of appeal, also rejected the IRS' argument that virtually no disclosure was required under the pre-1976 scheme.[22] Although these cases involved materials which would not be considered § 6103(b) material under the present statute, they clearly repudiate the position that the IRS takes here, since they determined that the IRS' authority to withhold tax-related information was quite limited.

Moreover, when the courts instructed the IRS to release tax-related information which identified particular taxpayers, the courts repeatedly ordered deletion of identifying information before disclosure. *Freuhauf Corp.* v. *IRS,* 522 F.2d at 292; *Tax Analysts & Advocates* v. *IRS,* 405 F. Supp. at 1067; *Tax Reform Research Group* v. *IRS,* 419 F. Supp. at 422; *Chamberlain* v. *Alexander,* 419 F. Supp. 235, 241-44 (S.D.Ala. 1976), *aff'd. in relevant part,* 589 F.2d 827 (5th Cir.), *cert. denied,* 444 U.S. 842 (1979). This is the same procedure which the Church maintains the Haskell Amendment requires.

4. The reformulation test which is advanced by both the court of appeals and the IRS raises serious questions about whether the strict standards of the FOIA (b)(3) exemption can be met. It is purely discretionary whether the IRS reformulates data in any particular file. Under the IRS' theory, it may institutionally determine in its sole discretion what data from its files will be disclosable

[22] *See Tax Analysts & Advocates* v. *IRS,* 505 F.2d 350 (D.C. Cir. 1974) (awarding disclosure of tax letter rulings); *United States* v. *Liebert,* 519 F.2d 542 (3d Cir.), *cert. denied,* 423 U.S. 985 (1975) (rejecting government's statutory argument that pre-1976 version of § 6103 and accompanying regulations would bar release of lists of persons who had not filed tax returns and certain financial information about them); *Freuhauf Corp.* v. *IRS,* 522 F.2d 284 (6th Cir. 1975), *vacated for reconsideration* in light of 1976 Tax Reform Act, 429 U.S. 1085 (1977) (ordering the release of letter rulings, technical advice memoranda, correspondence, indices and background files under the pre-1976 version of § 6103); *Tax Analysts & Advocates* v. *IRS,* 405 F. Supp. 1065 (D.D.C. 1975) (letter rulings and mandatory letter rulings ordered disclosed); *B & C Tire Co.* v. *IRS,* 376 F. Supp. 708 (N.D. Ala. 1974) (release of audit preparation materials not barred by old § 6103).

under the (b)(3) exemption, by choosing what documents it reformulates. Congress intended to eliminate precisely such unfettered discretion when it drafted the FOIA (b)(3) exemption.[23]

5. The IRS disputes the significance of subsequent legislative history wherein Congress, in amending § 6103 in 1981, implicitly endorsed those portions of two decisions[24] which support the Church's interpretation of the Haskell Amendment. (Pet. Br. 29-31.) In response, the IRS focuses on the mere fact that § 6103 was amended in 1981, subsequent to the *Long* decisions, rather than on the purpose of the amendment. (Resp. Br. 40-41 n.14.) Congress' decision to expressly prohibit release of audit criteria in no way impugned the interpretation of the Haskell Amendment in the *Long* opinions, as the issue of audit criteria does not involve questions about taxpayer identity.[25]

[23] The IRS' argument that the goals advanced by FOIA should not be considered significant here because § 6103 is primarily a privacy statute (Resp. Br. 44) wilfully ignores Congress' decision, in the Government in the Sunshine Act, Pub. L. No. 94-409 (1976), to narrow the FOIA (b)(3) exemption, applying it only to statutes which, by their explicit terms, establish particular criteria for withholding, thus legislatively overruling *FAA* v. *Robertson*, 422 U.S. 255 (1975). This occurred shortly before the Tax Reform Act of 1976 was enacted.

[24] *Long* v. *Bureau of Economic Analysis*, 646 F.2d 1310 (9th Cir.), *vacated*, 454 U.S. 934 (1981); *Long* v. *IRS*, 596 F.2d 362 (9th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980).

[25] The IRS also excerpts a passage from *King* v. *IRS*, 688 F.2d 488, 494 (7th Cir. 1982), which purportedly rejected the same argument based upon subsequent legislative history as the Church makes herein. This passage cannot aid the IRS as it simply misstates what Congress said. Congress stressed that statistical data and "other information" should continue to be disclosed in accordance with present law. By substituting the phrase "non-return information" for the words "other information" the *King* court distorted Congress' statement, and created an argument which evaporates when the accurate language from the Committee Report is utilized.

POINT IV

The IRS' Policy Arguments Are Speculative And Unsupported.

1. In its discussion of the policy considerations underlying 26 U.S.C. § 6103, the IRS raises the spectre of an informed requester learning the identity of taxpayers through FOIA despite redaction. (Resp. Br. 41-43.) As a corollary, the IRS argues that voluntary taxpayer compliance with the Internal Revenue reporting system would be undermined if the Church's interpretation of the Haskell Amendment prevails. (Resp. Br. 45-46.)

These arguments are entirely speculative and indeed belied by actual practice. The application of the Haskell Amendment with FOIA in the very manner supported by the Church has prevailed in the Ninth Circuit from at least 1980 to and including the present. *Long* v. *IRS*, 596 F.2d 362 (9th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980).[26] Additionally the same deletion and segregation procedure was mandated in the District of Columbia Circuit from at least 1981 until the decision below reversing *Neufeld* v. *IRS*, 646 F.2d 661 (D.C. Cir. 1981). Yet nowhere does the IRS support its alarmist conjecture about the purported ill-effects of the Church's interpretation of the Haskell Amendment by reference to any concrete evidence of harm arising from the practice in those jurisdictions.

The IRS cites to *Willamette Industries, Inc.* v. *United States*, 689 F.2d 865 (9th Cir. 1982), *cert. denied*, 460 U.S. 1052 (1983), as its sole example of "[t]he problem of inadvertent disclosure" to an informed requester. (Resp. Br. 43 n. 16.) Regrettably, the IRS completely misstates the finding in that case when it asserts that the court recognized that there was a genuine threat of taxpayer identification. In fact, the court of appeals affirmed the trial

[26] *See* IRS, *Disclosure of Information Handbook*, IRM 1272, Chapter 1300, p. 1271-158.1 (1986 Rev.), which sets out the procedure for "editing of taxpayer identifying details" in responses to FOIA requests in the Ninth Circuit.

court finding that the IRS position was "too speculative and not supported by facts." 689 F.2d at 868.

The IRS' reliance on *Baldridge* v. *Shapiro*, 455 U.S. 345 (1982) to support its policy arguments (Resp. Br. 45-46), is misplaced for the reasons which distinguish the facts of that case from the instant case, particularly Congress' expressly stated desire to prohibit absolutely disclosure of census materials. *See* discussion in Pet. Br. at 43-44.[27]

2. The IRS seems to be arguing that FOIA should be narrowly construed whenever disclosure of any tax-related information is at issue.[28] This is entirely unjustified by any legitimate policy objectives. Section 6103(b) by its own terms prevents the release of any information which could "be associated with, or otherwise identify, directly or indirectly" a taxpayer. 26 U.S.C. § 6103(b)(2). Nor does the Church seek the release of any such identifying data. The IRS' position, on the other hand, would bar disclosure of information which was completely nonconfidential, a legislative purpose which is nowhere evident in the history of this statute.

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[27] Similarly, the IRS' reliance on *Department of Air Force* v. *Rose*, 425 U.S. 352 (1976), does not further its conjectural claim of harm. Indeed, to the contrary, in that case this Court expressly noted that deletion of identifying information was sufficient to ensure continued voluntary compliance with the Cadet "honor code." 425 U.S. at 370 n.8. This observation was made irrespective of this Court's comment, quoted by the IRS, that "redaction cannot eliminate all risks of identifiability." 425 U.S. at 381. Further, that excerpt is quoted out of context, as it is immediately followed by the explanation that "any human approximation risks some degree of imperfection. . . . ," *id.*

[28] The IRS' position is at odds with the well-established rule that FOIA exemptions should be narrowly construed. *Dept. of Air Force* v. *Rose*, 425 U.S. 352, 361 (1976); *Vaughn* v. *Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). Indeed, in hearings held in 1972 to monitor agency compliance with FOIA, the IRS was a major target of congressional criticism for failing to honor the spirit or the letter of FOIA's disclosure requirements. *U.S. Government Information Policies and Practices—Administration and Operation of the Freedom of Information Act (Part 6)*, H.Rep., Hearings before a Subcommittee of the Committee on Government Operations, 92nd Cong., 2nd Sess. (1972) at 2021-58.

Indeed, if this Court were to affirm the vague "reformulation" standard, it would undoubtedly encourage the IRS to invoke § 6103 in response to the overwhelming majority of FOIA requests. In its opening brief the Church furnished examples, including statements made by IRS counsel at oral argument below, of the IRS' existing tendency to interpret broadly the scope of return information. (Pet. Br. 40-41 n.38.) The IRS now concedes that it currently denies nearly 25% of all FOIA requests on § 6103 grounds alone. (Resp. Br. 45 and n.17.) This surely does not even reflect the fact that FOIA requests from within the populous Ninth Circuit are far less likely to be denied upon § 6103 grounds, because the decisions in the *Long* case are still the law in that jurisdiction. Further, the very Report cited by the IRS reveals that § 6103 was virtually the only statute invoked by the IRS in support of § 552(b)(3) exemption claims.

3. The IRS misportrays what tax return information is, and suggests that no public interest is served by disclosure of such information. (Resp. Br. 44.) However, the IRS has acknowledged that in the instant case there are "numerous" files which may be relevant to the Church's FOIA request which it has excluded from its search on grounds that they contain return information. (Resp. Br. 6.) Surely, the Church, which has indisputably been the subject of improper IRS information gathering (Pet. Br. 5-6 and n.4), has a valid interest in obtaining references to it which happen to reside in third-party files, so long as the confidentiality of other taxpayers is maintained in accordance with the Haskell Amendment.[29]

In sum, the court of appeals and the IRS would interpret the Haskell Amendment in a manner which would

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[29] The briefs of the *amici curiae* in this case amply demonstrate other areas of public importance, including tax policy matters, for which access to redacted tax return information plays a vital role. Brief of *Amici Curiae* Professor John L. Neufeld, *et al.* at 11-14, Brief of *Amici Curiae* American Civil Liberties Union *et al.* at 24-28.

effectively ignore Congress' mandate that FOIA exemptions be narrowly construed, without enhancing taxpayer confidentiality. These are the real policy considerations here

CONCLUSION

The judgment of the court of appeals incorporating the *en banc* opinion of the court of appeals should be reversed for the reasons stated herein. The case should be remanded to the court of appeals for further proceedings consistent with the construction of the Haskell Amendment urged herein.

Dated: September, 1987

Respectfully submitted,

MICHAEL LEE HERTZBERG
275 Madison Avenue
New York, New York 10016
(212) 679-1167

ERIC M. LIEBERMAN
ELLEN J. WINNER
RABINOWITZ, BOUDIN, STANDARD,
KRINSKY & LIEBERMAN, P.C.
740 Broadway, 5th Floor
New York, New York 10003
(212) 254-1111

KENDRICK L. MOXON
Of Counsel

AMICUS CURIAE

BRIEF

(5)

No. 86-472

IN THE

Supreme Court of the United States

October Term 1986

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
Petitioner,

v.

INTERNAL REVENUE SERVICE, *et al.*,
Respondents.

On Petition For a Writ of Certiorari to
the United States Court of Appeals for the
District of Columbia Circuit

BRIEF OF *AMICI CURIAE* PROFESSOR JOHN L. NEUFELD, THE FREEDOM OF INFORMATION CLEARINGHOUSE, AND PUBLIC CITIZEN

DAVID C. VLADECK
(Counsel of Record)
ALAN B. MORRISON
PATTI GOLDMAN

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for *Amici Curiae*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Statutes:

Legislative Material:

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BRIEF OF *AMICI CURIAE* PROFESSOR JOHN L. NEUFELD, THE FREEDOM OF INFORMATION CLEARINGHOUSE, AND PUBLIC CITIZEN

INTRODUCTION AND INTERESTS OF *AMICI*

This brief is filed on behalf of Professor John L. Neufeld, a professor of economics at the University of North Carolina at Greensboro, the Freedom of Information Clearinghouse, and Public Citizen.[1] Professor Neufeld and the two organizational *amici* have a longstanding interest in the interpretation of 26 U.S.C. § 6103. Professor Neufeld was the plaintiff in *Neufeld v. IRS,* 646 F.2d

[1] This brief is filed with the consent of the parties. Letters of consent have been filed with the Clerk of the Court.

661 (D.C. Cir. 1981), and he was represented by attorneys from Public Citizen and the Freedom of Information Clearinghouse.[2] In addition, attorneys from these organizations have routinely represented taxpayers who have requested, and have been granted access to, tax return information that, under the majority decision below, the Internal Revenue Service ("IRS") will now be forbidden to disclose.

Amici file this brief because of their concern that the decision of the majority below erects a virtually impenetrable wall around all information that can be gleaned from tax returns. If sustained, the majority's ruling will thwart legitimate uses of tax data for academic research and to promote debate on matters of vital concern to the public, even where disclosure would not threaten the privacy of any taxpayer. In the court below, the IRS persuaded the majority to abandon the D.C. Circuit's prior interpretation that 26 U.S.C. § 6103(b)(2) shields from disclosure under the Freedom of Information Act ("FOIA") only tax return information which, if disclosed, could reveal the identity of an individual taxpayer. In its place, the majority adopted a construction of section 6103 that, for all practical purposes, forbids access to virtually all IRS records that are based on tax returns. As a result, the bulk of the files of the IRS – the only federal agency that

[2] In addition to representing Professor Neufeld, lawyers from Public Citizen and the Freedom of Information Clearinghouse have participated in a number of Freedom of Information Act cases before this Court, including representing the requesters in *CIA v. Sims*, 471 U.S. 159 (1985), *Administrator, FAA v. Robertson*, 422 U.S. 255 (1975), and *GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375 (1980), and participating as *amici* in, *inter alia*, *FBI v. Abramson*, 456 U.S. 615 (1982) and *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978).

deals with all adult Americans – is now effectively insulated from public scrutiny under the FOIA.

Amici urge the Court to reject the interpretation of section 6103 adopted by the Court below for several reasons. First, it is unsupported by the literal language of section 6103, particularly when construed in light of the policies underlying the provisions of the Tax Reform Act which modified section 6103 and the FOIA.

Second, it simply makes no sense. Nowhere has the IRS explained why Congress would have imposed a blanket, unqualified prohibition against disclosure of information which would invade no one's privacy and which would not otherwise injure any legitimate governmental interest. Congress was not in the Tax Reform Act, and surely not in the FOIA, interested in promoting secrecy as an end in itself. All of the IRS' concerns about the adverse consequences that could theoretically flow from disclosure were fully answered by the D.C. Circuit in *Neufeld* and the Ninth Circuit in *Long v. IRS*, 596 F.2d 362 (1979), *cert. denied*, 446 U.S. 917 (1980), which gave the IRS full authority to withhold *any* tax return information that could identify or even lead to the identification of a taxpayer. Although *Long* and *Neufeld* have been the governing law in two circuits for years, and were followed in other circuits, the IRS has been unable to point to any concrete problems with administering the disclosure rules laid down by those cases.

Lastly, the majority below failed to acknowledge the stark consequences of its decision. Under its ruling, a cloak of secrecy has been placed over the workings of the IRS, stifling legitimate oversight of the one federal agency with which each wage-earning American must deal. For these reasons, *amici* urge the Court to reject the IRS' claim, and to reverse the judgment below.

STATEMENT

The history of section 6103(b)(2), and the last-minute addition of the Haskell Amendment to the Tax Reform Act of 1976, will be set forth in detail in the briefs of the parties and will not be repeated here. Nor will *amici* attempt to restate the factual background of this case, which will be discussed in the parties' briefs, and is fully summarized in the panel opinion below, *Church of Scientology of California v. IRS,* 792 F.2d 146 (D.C. Cir. 1986). Moreover, because petitioner's brief will undoubtedly present a comprehensive rebuttal to the arguments raised by the IRS and the majority below, *amici* will not engage in a point-by-point refutation of those contentions. Rather, *amici* file this brief to focus on several discrete issues which have critical importance, but which might not stand out in petitioner's more comprehensive treatment of the issues.

ARGUMENT

SECTION 6103 DOES NOT PROVIDE A BASIS FOR WITHHOLDING TAX RETURN INFORMATION UNLESS DISCLOSURE COULD LEAD TO THE IDENTIFICATION OF AN INDIVIDUAL TAXPAYER.

The IRS' chief claim is that section 6103's prohibition on disclosure of tax return information must be construed broadly to bar release of all IRS records relating to tax returns, even if the records have been redacted to eliminate any possibility that disclosure would identify a taxpayer. According to the IRS' theory, which was accepted by the majority below, the only information derived from tax returns which may be publicly disclosed is information that has both been purged of all personal identifiers and recast in a different format, such as statistical compilations or summaries.

To sustain this conclusion, the majority had to depart from a long line of precedents. In the ten years since the passage of the Tax Reform Act, four of the five circuits to consider the scope of section 6103 rejected the IRS' position, and reached the same conclusion as the courts in *Neufeld* and *Long. See, e.g., Stephenson v. IRS,* 629 F.2d 1140 (5th Cir. 1980); *Currie v. IRS,* 704 F.2d 523 (11th Cir. 1983). Only the Seventh Circuit in *King v. IRS,* 688 F.2d 488 (1982), accepted the IRS' view.

The reason why the IRS encountered such difficulty was its complete failure to suggest a plausible argument as to why the language of the Haskell Amendment does not mean what it says. The exception set forth in the Haskell Amendment, while perhaps not a model of clarity, is hardly ambiguous. It provides that the term "return information" used in subsection 6103(a) "does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer." As the D.C. Circuit concluded in *Neufeld,* "by its own terms, the statute [section 6103] makes it clear that data that do not identify a particular taxpayer are not return information and are thus subject to disclosure under the FOIA." 646 F.2d at 663.

While the opinions in both *Long* and *Neufeld* are based principally on the plain language of the Haskell Amendment, there is additional support in section 6103 for that result. Indeed, the provision as a whole is directed solely to safeguard the privacy of individual taxpayers. The clearest illustration of this is subsection (b)(2)(A), which defines "return information" exclusively in terms of an identifiable taxpayer. Its language is sharply focused on "[a] *taxpayer's* identity, the nature, source, or amount of *his* income . . . or whether the *taxpayer's* return was, is being, or will be examined . . ." (emphasis added).

The majority below rejected the plain reading of the Haskell Amendment adopted by *Long, Neufeld,* and a number of other courts for two main reasons, both of which were first advanced in *King v. IRS, supra.* First it found it unlikely that Congress would have broadly defined non-disclosable return information in subsection 6103(a) and then, in the Haskell Amendment, which the majority describes as an "afterthought," swept away that blanket protection. Second, looking solely at the language of the Haskell Amendment, the majority concluded that the phrase "in a form" required a reformulation of tax return information before it would be subject to disclosure.[3]

The majority's analysis, like that of the Seventh Circuit in *King*, is riddled with flaws and should be rejected. First, its reading of the text of section 6103 is at best strained, since Congress could have hardly embarked on a more oblique route if its goal was simply to forbid the disclosure of *any* return information which was not merged or reformulated into a statistical summary of some sort. Moreover, the majority failed to even consider a far more plausible reading of the term; *i.e.*, that returns or other documents containing return information must be redacted until they are "in a form" that guarantees taxpayer confi-

[3] The majority's approach to statutory analysis is at odds with settled canons of construction. After concluding that section 6103, when read as a whole, is ambiguous, the majority proceeded to speculate about what Congress meant in the Haskell Amendment instead of examining the legislative history of the Tax Reform Act of 1976. But this Court has long emphasized that where the statutory language is not clear, courts should attempt to ascertain Congress' intent, instead of engaging in speculation about what Congress might have been seeking to achieve. *See Japan Whaling Ass'n v. American Cetacean Society*, 106 S. Ct. 2860 (1986).

dentiality. Surely, that reading is far more in keeping with the language and spirit of the provision as a whole.

Remarkably, the majority also disregarded the fact that this is an FOIA case. Section 6103 comes into play only because it qualifies under Exemption 3 to the FOIA, 5 U.S.C. § 552(b)(3), as a statute that specifically exempts information from disclosure. But under the FOIA the fact that section 6103 exempts *some* tax return information does not end the inquiry, since the question remains, what records fall within section 6103. And in answering that question, it is necessary to recall that all exemptions to the FOIA, including Exemption 3 and the statutes such as section 6103 that are incorporated into it, are to be narrowly construed, in keeping with the overarching congressional command in the FOIA – that "[d]isclosure, not secrecy, is the dominant objective of the Act." *Department of the Air Force v. Rose,* 425 U.S. 352, 361 (1976). Thus, in parsing section 6103 without regard to the pro-dislcosure dictates of the FOIA, the majority below neglected an essential task. Consequently, the court reached a result that is indefensible when measured against the FOIA's requirement that information should not be shielded from public scrutiny unless secrecy serves certain articulable public purposes. *Id.;* 5 U.S.C. § 552(b).[4]

[4] The majority's failure to consider this case within the framework of Exemption 3 is particularly surprising in light of the fact that Exemption 3 was completely overhauled by Congress at precisely the same time as it was enacting the Tax Reform Act of 1976. Thus, Congress amended Exemption 3 in 1976 to overrule this Court's decision in *Administrator, FAA v. Robertson,* 422 U.S. 255 (1975), Pub. L. No. 94-409, 90 Stat. 1241, § 5(b) (1976), just three weeks prior to the passage of the Tax Reform Act. And the congressional deliberations on the Tax Reform Act made frequent mention of the interrelationship between the two statutes, noting that access would be governed in part by the FOIA. *See, e.g.,* S. Rep. No. 94-938, 94th Cong., 1st Sess., Pt. 1, 303-15 (1976), *reprinted in* [1976] U.S. Code, Cong. & Admin. News at 3732-44.

The most glaring flaw in the majority's analysis, however, is its failure to provide any explanation as to why Congress would have wanted to forbid access to information that would not threaten the privacy interests of individual taxpayers or jeopardize any governmental interest. This failure is especially telling since it is clear that disclosure of this information would provide important public benefits. While the IRS' briefs have repeatedly recited a litany of harms that could flow from the disclosure of even carefully redacted return information, it has failed to explain why the protections afforded by section 6103, as construed by a number of circuits, are inadequate. Under the standard laid down in the prevailing caselaw, with which *amici* and other requesters are in full accord, disclosure is forbidden if the information could identify, directly or indirectly, an individual taxpayer. *See, e.g., Long, supra; Neufeld, supra.* Yet the IRS has never substantiated its concern that these protections are not adequate. Indeed, after more than seven years of experience in the Ninth Circuit under the *Long* decision, and six years of experience in the District of Columbia Circuit following *Neufeld,* if there were any substance to the IRS' speculation about violations of taxpayer privacy, the IRS would be able to present at least a shred of evidence to support its conjecture, especially since any FOIA action can be filed in the District of Columbia. 5 U.S.C. § 552(a)(4)(B). Therefore, the failure of the IRS to come forward with anything more concrete than its unsupported concern strongly supports *amici's* view that the standard adopted by *Neufeld* and *Long* adequately protects taxpayer privacy.

2. The majority compounded the flaws in its analysis by refusing to even acknowledge the history of the Tax Reform Act of 1976. Although the majority opinion dissects

the language of section 6103 and speculates repeatedly about Congress' intent, it does not even mention the legislative history that prompted the overhaul of section 6103. In its briefs to the court below, the IRS argued that section 6103 was amended because Congress was fearful that return information was being improperly disclosed to the public, and that a limiting construction of the Haskell Amendment would be in keeping with that intent. However, in so arguing, the IRS completely misreads Congress' purpose in the Tax Reform Act.

The principal impetus behind these aspects of the 1976 Tax Reform Act was the fear that IRS records were being too freely transmitted *within* government, at times for improper purposes, and that these intra-governmental disclosures were compromising the privacy interests of individual taxpayers. *See, e.g.,* S. Rep. No. 94-938, 94th Cong., 1st Sess., Pt. 1, 315-26 (1976), *reprinted in* [1976] U.S. Code, Cong. & Admin. News at 3744-56; *Chamberlain v. Kurtz,* 589 F.2d 827, 835 (5th Cir. 1979); *see also* Joint Committee on Internal Revenue, *Investigation Into Certain Charges of the Use of the Internal Revenue Service for Political Purposes,* 93d Cong., 1st Sess. (Comm. Print 1973) (hereinafter "*1973 Investigation*"). Indeed, Congress recognized that the Privacy Act, which had been passed by Congress just two years earlier, would flatly prohibit public disclosure of any tax records concerning an individual without the individual's express consent. 5 U.S.C. § 552a(b); *see also* 5 U.S.C. § 552(b)(6) (providing FOIA exemption for matters involving a clearly unwarranted invasion of personal privacy). Thus, in the Tax Reform Act, Congress determined that, while the Privacy Act provided ample protection against the disclosure of taxpayer-identifiable IRS records to third parties, intra-governmental uses of tax information were not adequately controlled

under existing law. *E.g.*, S. Rep. No. 94-938, *supra*, at 316. Accordingly, there is no support at all for the IRS' claim, and the assumption of the majority below, that Congress, through the Haskell Amendment, intended to foreclose public access to tax return information where the information could not compromise the identity of an individual taxpayer.[5]

By disregarding the history of the Tax Reform Act of 1976, the majority below overlooked another key point. Although the majority appears to believe that it is endorsing a construction of section 6103 that has been consistently held by the IRS, that is not the case. In fact, when the 1976 amendment to section 6103 was originally enacted, the IRS espoused a position that was diametrically opposed to the one that it now holds. Thus, on March 1, 1977,

[5] Indeed, given the state of the law at the time that Congress considered the Tax Reform Act, it is difficult to understand why Congress would not have spoken with a clearer voice if it intended to prohibit disclosure of all return information, redacted or otherwise, on a blanket basis. Just prior to Congress' deliberations on the Act, the United States District Court for the District of Columbia had soundly rejected the IRS' contention that section 6103 as then written permitted the IRS to withhold records containing tax returns in their entirety. Rather, the court ordered the records to be disclosed, but directed the deletion of information that would identify specific taxpayers. *Tax Reform Research Group v. IRS*, 419 F. Supp. 415 (D.D.C. 1976). Although this ruling had been issued prior to the amendments, and while Congress discussed the interaction between the FOIA and section 6103, it did not mention this ruling, let alone indicate its disagreement with it. *See* S. Rep. No. 94-938, *supra*, at 316. Congress has more recently made its view clear. During the course of the 1981 amendments to section 6103, Congress expressly endorsed the rulings in *Long* and *Neufeld* and confirmed that "information that cannot identify an individual is not protected under the disclosure restrictions [of section 6103]." H.R. Rep. No. 97-215, 97th Cong., 1st Sess. 264 (1981), *reprinted in* [1981] U.S. Code, Cong. & Admin. News 105, 353.

shortly after the effective date of the Tax Reform Act, Acting IRS Commissioner William E. Williams told a House subcommittee that the FOIA compelled release of IRS records which did not identify individual taxpayers. *Hearings Before the Treasury, Postal Service, and Government Appropriations Subcomm. of the House Committee on Appropriations*, 95th Cong., 1st Sess. 47 (Comm. Print 1977). Nowhere in the course of the hearings did Acting Commissioner Williams or anyone else from the IRS even suggest the argument raised by the IRS here, namely that section 6103 forbids disclosure of all tax return information that has not been reformulated. Acting Commissioner Williams' views on this matter were shared by the then Chief Counsel to the IRS, as well as numerous other high-ranking IRS officials. *Id.* Yet the IRS has never attempted to explain its about-face.

Nor has the IRS attempted to explain how its legal theory can be reconciled with Congress' intent, clearly expressed in 1976, that section 6103 not bar the continued preparation and release of "tax models." At that time, and until 1980, the tax models that were routinely made available to the public were actual returns with identifying details eliminated, which strongly supports the *Neufeld/Long* position that redaction is enough to take a document out of the "return information" classification. But, under the IRS' present theory, for at least four years, the agency not only violated subsection 6103(a) by making tax models public, but exposed its personnel to criminal sanctions for doing so. 26 U.S.C. § 7213(a)(1).

3. In addition to the analytical flaws that pervade the majority decision, its conclusion appears to be colored by its assumption that, aside from broad statistical summaries or aggregated data which the IRS may choose to prepare or not, tax return information is of no legitimate

value or interest to the public. In assessing the importance of public disclosure of tax return information, *amici* urge the Court to look beyond the limited facts of this case. Regardless of the interests at stake here, there are a number of instances in which disclosure of return information, redacted to preserve taxpayer confidentiality, is of exceptional public importance.

At the outset, it is important to keep in mind that, of all of the federal agencies, the IRS is the only one with which all Americans must deal, albeit with regret, every year of their adult lives. To accomplish its mammoth task, the IRS has been granted enormous powers over individual taxpayers: the IRS may require taxpayers to submit information on every aspect of their financial affairs, to be subject to audits and investigations, to justify every claimed expenditure and deduction, and, not infrequently, to pay penalties. Given the power that the IRS wields, there is little that the IRS does that is not the subject of intense and legitimate public interest.

The facts of *Neufeld* illustrate how important it is to the maintenance of public confidence in the IRS that return information that does not compromise the identity of a taxpayer be available to the public. *Neufeld* involved access to documents relating to attempts by certain members of Congress, White House staff, and others in high government positions to intercede in ongoing IRS proceedings, particularly audit and collection cases. *See, e.g., 1973 Investigation, supra; Center on Corporate Responsibility v. Shultz,* 368 F. Supp. 863 (D.D.C. 1973). In light of these revelations, Professor Neufeld requested letters from taxpayers and members of Congress to the IRS which focused on particular disputes involving a specific taxpayer. Under the decision in *Neufeld,* all of the information that might conceivably lead to the identification of

the taxpayer was deleted. However, much of the information enumerated in subsection 6103(b)(2)(A) — such as, the amount at issue, the nature of the claimed tax liability, the IRS' position, and the IRS' ultimate disposition of the matter — was made available. These disclosures provided Professor Neufeld with a fairly clear picture about what transpired at the IRS in each case, and the degree to which the IRS was influenced by political forces. Without that information, however, the letters would have been virtually meaningless since it would have been extremely difficult to assess the nature and dimension of the taxpayer's problem, the involvement of the members of Congress, and the IRS' response. Under the restrictive reading of section 6103 adopted by the majority below, efforts such as Professor Neufeld's to monitor the extent to which the IRS is susceptible to political manipulation will be thwarted, as will other legitimate attempts to follow the course of IRS activity and decision-making. *See also Moody v. IRS,* 654 F.2d 795 (D.C. Cir. 1981); *Tax Reform Research Group v. IRS, supra.*

Not only will the ruling below stifle academic research, but it will also bar individuals from learning basic facts about IRS investigations. As cases like *Chamberlain v. Kurtz, supra,* exemplify, the IRS is not infallible. Carefully controlled access to IRS records, which safeguards the privacy of individuals, but allows taxpayers in general to see how the IRS operates, whether it conforms to its rules, and whether it is evenhanded in its administration of the tax laws, contributes to public confidence in our tax system.

The IRS' decade-long experience with making public its letter rulings under section 6110 illustrates both the value of providing the public with information regarding the agency's operations and the precise nature of Congress'

concern over taxpayer privacy. Subsection 6110(a) establishes a broad presumption that "the text of any written determination and any background file document relating to such written documentation shall be open to public inspection. . . ." Subsection 6110(b) goes on to define "background file document" to include, *inter alia,* "the request for that written determination, any written material submitted in support of the request, and any communication (written or otherwise)" between the IRS and anyone outside the agency in connection with the request. The exemptions from disclosure, set out in subsection (c), require the IRS to delete from the public file among other things, "the names, addresses, and other identifying details of the person to whom the written determination pertains and of any other person," except where an individual has waived his or her privacy rights.

This scheme precisely mirrors the approach followed by the *Neufeld* and *Long* courts, and fully accommodates the public's right to be informed about the workings of the IRS without sacrificing the privacy interests of taxpayers. And the fact that Congress set forth this scheme for letter rulings – which often contain exactly the sort of information that is set forth in tax returns – at the same time that it overhauled section 6103 lends considerable strength to the theory adopted in the *Long/Neufeld* line of cases, but rejected by the majority below.

In light of the important uses to which return information can be put, and the existence of adequate protections to preserve taxpayer confidentiality imposed by the standard laid down in *Long* and *Neufeld,* there simply is no reason to prohibit on a wholesale basis the disclosure of tax return information. On the contrary, the balance struck in *Long* and *Neufeld* ensures that taxpayer privacy

remains the paramount interest, without needlessly sacrificing public access to important IRS records.

CONCLUSION

For the reasons stated above, and in the briefs of petitioner, this Court should reverse the judgment below.

Respectfully submitted,

DAVID C. VLADECK
(Counsel of Record)
ALAN B. MORRISON
PATTI GOLDMAN

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for *Amici Curiae*

April 27, 1987

AMICUS CURIAE

BRIEF

No. 86-472

IN THE

Supreme Court of the United States

October Term, 1986

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
Petitioner,

v.

INTERNAL REVENUE SERVICE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON, AND PROFESSOR SUSAN B. LONG

STEPHEN K. STRONG
Counsel of Record
DAVID F. STOBAUGH
BENDICH, STOBAUGH & STRONG
2111 Smith Tower
Seattle, WA 98104
(206) 622-3536

Counsel for Amici Curiae
American Civil Liberties Union,
American Civil Liberties Union of
Washington and Professor Susan B. Long

JOHN A. POWELL
DAVID B. GOLDSTEIN
American Civil Liberties
Union Foundation
132 W. 43rd Street
New York, NY 10036
(212) 944-9800
Counsel for Amicus
American Civil
Liberties Union

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TABLE OF CONTENTS

TABLE OF CONTENTS, cont.

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES, cont.

TABLE OF AUTHORITIES, cont.

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INTEREST OF AMICI[1]

The American Civil Liberties Union (ACLU) is a nonpartisan civil liberties organization of over 250,000 members. The American Civil Liberties Union of Washington (ACLU-W) is the Washington State affiliate of the ACLU. The ACLU and its affiliates promote freedom of information through legislation and litigation. They also endorse strong protections for taxpayer privacy. The ACLU and its affiliates therefore support the purpose of the statute at issue, 26 U.S.C.

[1] Counsel for all parties have consented to filing of this brief and their letters of consent have been filed with the Clerk.

§6103, which protects taxpayer privacy while allowing disclosure of important nonidentifiable information concerning tax policy and IRS practices.

The ACLU-W provided representation for Susan B. Long in the first appellate decision on Internal Revenue Code §6103(b)(2). *Long v. IRS*, 596 F.2d 362 (9th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980). The *Long* decision was extensively discussed in the majority and dissenting opinions of the court below. The ACLU-W submitted an *amicus* brief to the D.C. Circuit in this case. See *Church of Scientology v. IRS*, 792 F.2d 153, 156, 162 n.3, 175-76 n.7 (D.C. Cir. 1986)(*en banc*).

Susan B. Long is Associate Professor of Quantitative Methods at Syracuse University and director of Syracuse's Center for Tax Studies. Professor Long makes extensive use in her scholarly research of IRS information — both individual-level information in anonymous form and statistical tabulations. (See, *e.g.*, S. Long, *The Internal Revenue Service: Measuring Tax Offenses and Enforcement Response* (Nat'l Inst. of Justice, U.S. Dep't of Justice, 1980).)

Professor Long was a party in several decisions applying §6103(b)(2). *Long v. IRS*, 596 F.2d 362 (9th Cir. 1979); *Long v. BEA*, 646 F.2d 1310 (9th Cir. 1981), *remanded for further consideration*, 454 U.S. 934 (1981), *remanded*, 671 F.2d 1229 (9th Cir. 1982); *Long v. IRS*, 742 F.2d 1173 (9th Cir. 1984). Through this litigation Professor Long obtained important tax information on a sample of anonymous individuals who were audited in the IRS's Taxpayer Compliance Measurement Program (TCMP). She is using some of the TCMP information she obtained in a study of the impact of tax code complexity on taxpayers' compliance, with financial assistance from the National Science Foundation (Grant No. SES 85-10625, Dec. 1985). Disclosability of certain TCMP data is still in dispute and the *Long* cases listed above are pending again before the

Ninth Circuit. The ultimate outcome could be affected by the decision in this case, since the IRS specifically seeks in this case to overturn the Ninth Circuit's *Long* opinions. IRS Br. in Response to Petition 7 (Dec. 1986).

Amici's concern is that the IRS is essentially seeking exemption from the Freedom of Information Act for all case files and individual-level (unaggregated) tax information. The IRS might in effect obtain an almost total exemption if the majority opinion below is sustained, depriving the public of a great deal of valuable information on IRS practices and tax policy matters. The majority *en banc* opinion held that IRS case files, and other tax information on individuals, are disclosable to third parties only if the documents are both "reformulated" by IRS and nonidentifiable. Since the FOIA requires only deletion of exempt items, not "reformulation" of documents, adoption of the majority's view could allow the IRS to decide what information it will disclose by deciding what information it wishes to "reformulate."

STATEMENT OF THE CASE

Prior Proceedings

The Church of Scientology of California filed a lawsuit under the Freedom of Information Act (FOIA), 5 U.S.C.§ 552, seeking IRS records pertaining to the Church, other Scientology entities, and L. Ron Hubbard or Mary Sue Hubbard. The district court granted summary judgment to the IRS. The Church appealed, arguing that the district court erred in holding that Internal Revenue Code (26 U.S.C.) §6103 superseded the FOIA. The Church also asserted that IRS failed to conduct an adequate search for records.

The court of appeals *sua sponte* ordered that it would consider the following question *en banc:*

> Should the Court adhere to the interpretation of 26 U.S.C. §6103(b)(2) adopted by the panel opinion in *Neufeld v. IRS*, 646 F.2d 661, 665 (D.C. Cir. 1981), or should it adopt a different interpretation, in particular that announced by the Seventh Circuit in *King v. IRS*, 688 F.2d 488, 490-94 (7th Cir. 1982)?

This order indicated the court's concern over interpretation of the 1976 Senate floor amendment to §6103(b)(2), introduced by Senator Floyd Haskell (and often referred to as the "Haskell amendment"), which provided the following exception to the definition of nondisclosable "return information":

> . . . such term does not include data in a form which cannot be associated with or otherwise identify, directly or indirectly, a particular taxpayer.

The parties were directed to submit supplemental briefs on §6103(b)(2).

The *en banc* majority rejected interpretations of §6103 (b)(2) in prior appellate opinions and adopted a new interpretation, holding the Haskell amendment allows disclosure only of individual tax information that is both nonidentifiable and "reformulated." 792 F.2d at 163. The majority rejected the IRS argument that only aggregated data, or tabulations, are disclosable. 792 F.2d at 161-62.

The panel opinion resolved the issues raised in the Church's appeal. The panel held that §6103 is a withholding statute within the FOIA and it is therefore subject to the FOIA's procedural provisions. *Church of Scientology v. IRS*, 792 F.2d 146, 148-50 (D.C. Cir. 1986). It also held that the IRS failed to establish that its search for records was adequate or that all information in identifiable files was exempt. 792 F.2d at 152-53. The Church thus largely prevailed in the arguments it made on appeal.

The Church then petitioned for *certiorari*, seeking review solely of the *en banc* opinion, not the panel decision. Petition 2, 20. The IRS agreed to review of the *en banc* opinion, stating that it wanted the Court to interpret §6103(b)(2) because, it said, "the expansive reading of the Haskell amendment adopted by the Ninth Circuit [in *Long*] threatens the exposure of information that Congress sought to preserve as confidential." IRS Br. in Response to Petition 7. The IRS noted that the Church "has not sought review of the panel's judgment insofar as that judgment was unfavorable to it, and [the IRS has] not filed a cross-petition challenging that judgment insofar as it was unfavorable to the government." *Id.* at 6, fn.

Types of IRS Records

There are several types of IRS records on taxpayers. First, there are identifiable "returns" and "return information" pertaining to specific taxpayers that are protected from public disclosure under §6103(a), unless requested by the taxpayer or a person with a "material interest" in the return. Taxpayers may generally obtain identifiable IRS records about themselves unless "disclosure would seriously impair Federal tax administration." §6103(c) and (e)(7); *Church of Scientology v. IRS*, 792 F.2d at 153 (panel opinion). This is part of what the Church seeks. *Id.* at 147-48. The IRS may prove on remand that documents sought by the Church are covered by this exemption. *Id.* at 153.

Second, the IRS has case files on third parties that, according to IRS procedures adopted in 1985, are available to a requester — after deletion of taxpayer identification and other exempt information — only if the requester's residence or principal place of business is in the Ninth Circuit.[2] Internal

[2] The IRS has evidently not applied this provision to the instant request even though the Church's place of business is in California.

Revenue Manual (IRM) - Admin. Pt. I, "Disclosure of Official Information Handbook," MT 1272-149 (4-19-85), §(13)52, pp. 2287-56 to 2287-57 (CCH reprint), states:

> 1 For an Other-Than-Ninth-Circuit request, withhold the entire case file or the specific return information based on IRS §6103, FOIA exemption (b)(3) in conjunction with IRC §6103(a), and other appropriate FOIA exemptions.
>
> 2 For a Ninth Circuit request involving a case file or specific return information contained in a case file which is not otherwise exempt under the FOIA (e.g., by virtue of exemption (b)(7)(A)), edit to delete all direct or indirect identifiers to the extent necessary to preclude any possibility of association with a particular taxpayer and release.

The Church seeks information about itself and general IRS materials concerning Scientology found in third-party case files, such as in the files of other Scientology entities.

Third, the IRS prepares computer tapes containing samples of actual individual tax returns ('microdata"[3]) that are used in studies for statistical research and policy development. Examples of such files disclosed by IRS include "tax models" and "TCMP" surveys, described in *Long v. BEA*, 646 F.2d 1310, 1314 n. 1 [TCMP surveys], 1320 n. 4 [tax models] (9th Cir. 1981), and *Long v. IRS*, 596 F.2d 362, 364, 369 (9th Cir. 1979). "Tax models" are simply samples of almost 100,000 tax returns from which taxpayer identification was deleted

[3] "Microdata" refers to files that contain items directly from individual records. When microdata are summarized or aggregated, the product is a tabulation or report. Office of Federal Statistical Policy and Standards, U.S. Dep't of Commerce, *Statistical Policy Working Paper No. 2* at 23 (1978); L. Alexander and T. Sabine, "Access to Social Security Microdata for Research and Statistical Purposes," 41 *Social Security Bulletin* 3 (Aug. 1978).

by IRS. The Church does not know of any similar files of tax microdata that fall within its request, but an adequate search has not yet been conducted by IRS.

Fourth, the IRS prepares statistical tabulations which summarize or aggregate the individual data from tax returns and audits. See, *e.g.*, *Long v. IRS*, *supra*, 596 F.2d at 369. The Church does not know of statistical tabulations or aggregated data that fall within its request, but an adequate search has not yet been conducted by IRS. Fifth, the IRS has information (that may or may not be identifiable) which does not fall within the statutory definition of "return information" in §6103(b)(2) because it does not pertain to determination of any person's tax liability. See, *e.g.*, 792 F.2d at 141-52 (panel opinion), which refers to files on persons who threatened assaults. The Church seeks records containing nonreturn information. *Id.* See also J.A. at 177 (Church seeks IRS documents concerning Scientology beliefs, publications, courses and communications with members, together with news articles on the Church).

SUMMARY OF THE ARGUMENT

Amici support an interpretation of the statute which protects taxpayer privacy while allowing disclosure of important nonidentifiable information concerning tax policy and IRS practices. The court of appeals *en banc* majority held that tax information from actual returns or case files is nondisclosable unless it is both nonidentifiable and reformulated. If the opinion of the court below is sustained, the IRS will in effect obtain a nearly complete exemption from the Freedom of Information Act since the IRS has no duty under the Act to reformulate any records. This will mean that individual tax data that are normally released by the IRS, GAO and other government entities in anonymous form will no longer be disclosable for use by scholars and members of the public

evaluating IRS policies and practices. It also means that records about possible IRS misuse of its powers, such as a recurrence of political audits directed by the White House, would be insulated from public scrutiny.

Congress provided that nonidentifiable individual information would be released under the FOIA in the Haskell amendment to §6103(b)(2). The plain words of that amendment state that individual data may be released so long as they do not directly or indirectly identify any taxpayer. The amendment does not require the additional reformulation required by the court below.

The legislative history also shows that Congress intended to allow the release of individual tax information so long as it did not identify specific taxpayers. Senator Haskell, the sponsor of the floor amendment, said the amendment was offered to allow the release of materials such as the tax model. The tax model was a sample of 90,000 taxpayer returns containing item-by-item information reported by taxpayers with identification deleted. Senator Haskell's reference to the tax model shows Congress' intent to allow the release of individual data that were not reformulated.

In subsequent 1981 legislation amending the same subsection, Congress expressly adopted the interpretation of §6103(b)(2) in *Long v. IRS*, 592 F.2d 362 (9th Cir. 1979), which held that the Haskell amendment allows the release of nonidentifiable individual tax data.

Therefore, *amici* support the Church's interpretation of §6103(b)(2), although they take no position on the disclosability of any particular IRS records sought by the Church.

ARGUMENT

I. The Purpose and Text of Internal Revenue Code §6103, As Amended In 1976, Establish That Congress Intended To Allow Disclosure of Anonymous Individual Tax Information When It Is Not Within The Specific Disclosure Exemptions of §6103 or The Freedom Of Information Act.

A. *The Primary Reason for the 1976 Amendments to §6103 Was to Prevent Indiscriminate IRS Release of Individually Identifiable Tax Information to Other Government Agencies for Political and Other Non-Tax Purposes.*

Prior to the 1976 Tax Reform Act, Internal Revenue Code §6103 provided that all tax returns were "public records", but they were open to inspection only under Presidential regulations or orders. The regulations permitted disclosure of individually identifiable tax information to many government agencies outside the IRS. Federal, state and local agencies, and the White House, received individual tax data, including copies of income tax returns, for purposes that were unrelated to the reason for collection — determination of income tax liability — and the information was used against the taxpayers for political and other purposes. S.Rep. No. 94-938, 94th Cong., 2d Sess. 315-26 (June 3, 1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 3439, 3746-47, 3751, 3766; 122 Cong. Rec. 24,012 and 24,013 (July 27, 1976)(remarks of Senators Dole and Weicker). Congress was concerned that disclosure of identifiable tax information for non-tax purposes violated taxpayers' privacy and could damage their willingness to voluntarily comply with the tax laws. *Id.* Accordingly, Congress substantially amended §6103 as part of the comprehensive tax code revisions in the Tax Reform Act of 1976. Pub.L. No. 94-455, §1202, 90 Stat. 1520 (1976).

B. *The 1976 Revisions to §6103 Include Comprehensive Provisions for Taxpayer Privacy and Limited Disclosure of Identifiable Tax Data, While Allowing Release of Anonymous Individual Data.*

Revised §6103 contains detailed limitations on IRS disclosure of identifiable tax returns and return information to other government agencies. For agencies outside the IRS that may receive individually identifiable tax data, the section specifies the purposes for which they may use the data and the restrictions on further disclosure, as well as stating the conditions under which the tax information can be publicly released. For example, subsection 6103(j)(1)(B) permits release of corporate return information to the Bureau of Economic Analysis (BEA) "for the purpose of, but only to the extent necessary in, the structuring of . . . national economic accounts and conducting related statistical activities . . ." The Senate Report showed the BEA annually inspects 20 to 100 actual tax returns of large corporations. Section 6103(j)(1) was intended to allow the BEA to continue to receive these individual corporations' tax returns for use in examining economic developments. S.Rep. No 94-938, *supra*, at 332-34.

Section 6103 contains provisions that allow some agencies to disclose tax data to the public in anonymous form. The provision dealing with disclosures by the BEA, the Census Bureau, and the Federal Trade Commission (FTC), states (§6103(j)(4)):

> (4) **Anonymous form.** — No person who receives a return or return information under this subsection shall disclose such return or return information to any person other than the taxpayer to whom it relates except in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

The heading of this subsection succinctly describes the mode of permissible disclosure by these agencies — "Anonymous Form." This section heading, included in the bill adopted by Congress, is used to construe a statute if it is ambiguous. *Knowlton v. Moore*, 178 U.S. 41, 65 (1900). The heading shows Congress' intent to allow the BEA to disclose corporate tax information in anonymous form, while the text defines what "anonymous form" is. §6103(j)(4).

A similar provision for IRS disclosure of data in nonidentifiable form was added by Senator Haskell's floor amendment to §6103(b)(2). The definition of "return information," which is otherwise confidential under §6103(a), was amended by the Senate to add the following language:

> . . . such term [return information] does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.

The Haskell amendment therefore allows the IRS to release tax data in nonidentifiable form.

The intent of the amendment was described briefly in the Conference Report (S.Conf.Rep. No. 94-1236, 94th Cong., 2d Sess., 476-77 (Sept. 14, 1976)):

> The Senate amendment provides that returns and return information are confidential and not subject to disclosure except as specifically provided by statute . . . Under the amendment, data in a form that cannot be associated with or otherwise identify a particular taxpayer will not constitute return information.

Thus, Congress intended that tax data be disclosable in a form that does not identify particular taxpayers, while individually identifiable information is confidential unless disclosure is expressly permitted by one of the subsections of §6103.

The first court of appeals decision interpreting §6103(b)(2) held "the explicit language" of this definitional subsection allows disclosure of individual tax "data that do not identify"

particular taxpayers. *Long v. IRS*, 596 F.2d 362, 368 (9th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980).[4] This interpretation is consistent with "the overall purpose" of the statute, since it will "protect the privacy of taxpayers" while at the same time it will effectuate the purpose of the amendment "to permit the disclosure of compilations of useful data in circumstances which do not pose serious risks of a privacy breach." 596 F.2d at 368. The Ninth Circuit further held that the IRS must delete identifying information to make the tax data available under the FOIA. *Id.* at 365-67.

The *Long* interpretation was initially followed by the D.C. Circuit, which stated that "by its own terms, the statute makes it clear that data that do not identify a particular taxpayer are not return information and are thus subject to disclosure under the FOIA." *Neufeld v. IRS*, 646 F.2d 661, 665 (D.C. Cir. 1981).

Thus, the text of §6103(b)(2) shows that Congress intended to permit disclosure of anonymous tax information. This interpretation is consistent with the purposes of the section, which were to protect taxpayer privacy and prevent government agencies from unnecessarily using individually identifiable tax data for non-tax purposes.

---

[4] The IRS agreed in *Long* that the "literal language" of §6103(b)(2) supported the Ninth Circuit's interpretation. The IRS Petition for Certiorari, No. 79-1269 (Oct. Term, 1979), stated (p. 13):

> Although we continue to believe that our interpretation of the Haskell amendment is correct and supported by legislative history of the most authoritative character, we do not ask this Court now to review the court of appeals' adherence to *the literal language of that provision* and its rejection of the applicability of Exemption 3 to the TCMP source documents. (Emphasis added.).

C. *The Court of Appeals Majority's "Reformulation" Requirement Is Based on a Misreading of the Section.*

The court of appeals held that IRS tax information, such as that sought by the Church, is governed by the FOIA. 792 F.2d at 148-50 (panel opinion). The panel held that the IRS must delete information protected by §6103 — "for example, information about deductions claimed by a taxpayer" — and disclose segregable portions. *Id.* at 152. The panel held that "mere deletion of identifying material will not cause the remainder of the information to lose its protected status, and document-by-document examination to determine the possibility of redaction for that purpose is therefore unnecessary." *Id.* at 151. The panel's holding is supported by a citation to the *en banc* opinion's discussion of the conditions under which individual tax information is disclosable under §6103(b)(2).[5] *Id.*

The *en banc* majority interpreted the Haskell amendment to §6103(b)(2) to permit disclosure of nonidentifiable tax information only if the original records have been altered by IRS through some type of "reformulation." 792 F.2d at 160-63. This nontextual addition to the requirements for disclosure is justified neither by the statutory language nor the purpose of the section.

The majority relies on a mistaken textual argument for the "reformulation" requirement.[6] 792 F.2d at 160-63. The opinion cites subsections 6103(j)(4) and (i)(7)(A), which contain language almost identical to that added by the Haskell amendment to §6103(b)(2). 792 F.2d at 160-61. The majority

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[5] Therefore, although neither party sought review of the panel opinion and its remand instructions, the district court would certainly consider this Court's interpretation of §6103(b)(2) when it acts upon the remand.

[6] The majority also relies on certain redundant language in §6103(f) to argue there can be nonidentifiable "return information."

assumes that these subsections refer to information provided by IRS to other agencies that "has *already* been reformulated," *id.* at 161 (emphasis original), and therefore the phrase "in a form" refers to reformulated data. The majority started with the assumption that the BEA, FTC and GAO receive only reformulations of data from the IRS and therefore it thought the phrase "in a form" in §6103(j)(4) and (i)(7)(A) pertains to the recipient agencies' disclosure to the public of such reformulated data. This interpretation would make these disclosure provisions superfluous, as the majority recognized. 792 F.2d at 163.

The BEA, FTC and GAO, however, do not receive "material that has already been reformulated" from IRS. The agencies receive actual identifiable tax returns, not "reformulated" information. See, *e.g.*, S. Rep. No. 94-938, 94 Cong., 2d Sess. 331-33 (June 10, 1976)(BEA examines corporate tax returns); Comptroller General, "IRS' Audits of Individual Taxpayers And Its Audit Quality Control System Need to Be Better," GAO Report No. GGD 79-59 (Aug. 15, 1979), p. 5 (GAO received sample of 490 audited tax returns). The provisions for public disclosure of "data in a form which cannot" identify, §6103(j)(4) and (i)(7)(A), are thus not superfluous because they require these agencies to protect the "return information" they receive and publicly disclose this information only when it is put into "anonymous form." [7]

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792 F.2d at 158. However, the subsection contains language that is at most an inconsistent implication, not an express definition at odds with §6103(b)(2). As the Ninth Circuit stated, "[g]iven a choice between adopting the explicit language of one section and an inconsistent implication of another, we chose the explicit language, particularly where, as here, it is consistent with the overall purpose of the Act." *Long v. IRS*, 596 F.2d at 368.

[7] Thus, GAO Report No. GGD-79-59, cited in the text, describes specific items from returns without revealing taxpayer identities.

The majority also believed that the phrase "in a form," found in §6103(b)(2), (j)(4) and (i)(7)(A), must require something more than mere nonidentification of taxpayers. 792 F.2d at 157-58, 160, 163. However, nothing in the text of the statute shows this to be necessary. The provision does not say "data in a reformulation which . . ." or "data in an aggregated or reformulated form . . ." The language is "data in a form which cannot be associated with, or otherwise identify, [particular taxpayers]." This is simply a definition of when data are in an "anonymous form," as the subsection heading of (j)(4) demonstrates.

The majority ignores a major problem with the reformulation requirement. An agency is required only to delete identifying items and it has no duty to reformulate its file to make it publicly available. *Yeager v. DEA*, 678 F.2d 315, 321 (D.C. Cir. 1982). Therefore, a prohibition on disclosure of non-reformulated data would give the IRS complete discretion to withhold any tax data it wishes, by deciding whether to refor-

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For example, the report states (at 15-16):

> The [IRS] classifier identified only interest expense amounting to $1,220 on the farm rental schedule as warranting examination. IRS disagreed [with GAO's criticism] that repairs of $734, automobile expenses of $706, and insurance of $530 also shown on the farm rental schedule were significant enough to warrant examination. We did not change our position because of other information contained on the return and developed during IRS' audit. The case file showed, for example, that the taxpayer and his spouse worked for wages as opposed to being self-employed, resided on the rental property, and claimed as farm equipment only one-half of a fully-depreciated automobile. Given this, we thought the claimed repairs and automobile expenses were significant enough to warrant examination. We considered the claimed insurance expense to be significant because the case file showed that the taxpayer had no insurance on a farm building which was destroyed by fire during the tax year.

mulate the records. 792 F.2d at 173 n.3 (dissenting opinion). Congress did not intend to give agencies broad discretion in determining what data to release to the public. The same Congress that amended §6103 in 1976 also amended the FOIA to substantially limit agency discretion in withholding records. 5 U.S.C. §552(b)(3), amended in Pub.L. No. 94-409, 90 Stat. 1241 (1976). (See H.Rep. No. 880, Pt. I, 94th Cong., 2d Sess. 23 (March 7, 1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News 2183, 2205; *Long v. IRS*, 742 F.2d 1173, 1180-81 (9th Cir. 1984).)

Moreover, the majority's new requirement would be so difficult to apply that it could not have been the intent of Congress to impose it. While a computer could be programmed to "reformulate" data on tapes, as IRS apparently did with some samples of individual tax returns known as the "tax models,"[8] 792 F.2d at 162 n.3, it makes no sense in the context of most return information in documentary form. "Return information" as defined in §6103(b)(2) includes any papers prepared by IRS in determining a person's tax liability, including investigative reports, interview notes, worksheets, letters and so on. It is hard to conceive how one would "reformulate" investigative reports or interview notes to make them disclosable.[9] On the other hand, deletion of identifying information is a well-understood and regularly applied procedure. *Department of the Air Force v. Rose*, 425 U.S. 352, 381 (1976).

[8] Versions of the IRS tax models since sometime after 1980 contain "fuzzing" of some return items on a random basis to modify the numbers without changing the statistical uses of the models. Not all tax models have figures that are "fuzzed," however, since through 1980 the tax models were simply samples of actual returns and these older tax models are still released by the IRS. See Exhibits to ACLU-W's Motion to Amend Opinion.

[9] The majority states that recopying the information onto a separate piece of paper in narrative style is not a sufficient alteration of an original document to meet the "reformulation" requirement. 792 F.2d at 163 n.5.

The reformulation requirement is so vague and confusing that Congress should not be thought to have required it without quite convincing textual evidence, especially since the legislative history shows the opposite, as discussed below.[10]

Thus, neither the text nor the purpose of the statute show that Congress intended to require reformulation of IRS records. The plain words of §6103(b)(2) provide for release of data that are not individually identifiable — directly or indirectly. Moreover, the legislative history of §6103(b)(2) establishes that Congress intended to allow disclosure of anonymous individual tax information.

II. The Legislative History of The 1976 Senate Floor Amendment to §6103(b)(2) Shows That Congress Intended to Allow Public Disclosure of Individual Tax Data From Which Specific Taxpayers Cannot Be Identified.

A. *The Legislative History of the Haskell Amendment*

When Congress enacted the 1976 Tax Reform Act, Senator Floyd Haskell was concerned that unless §6103 were clarified, individual data from tax returns might not be disclosed even in anonymous form. Accordingly, he introduced his floor amendment to §6103(b)(2) which states:

> [S]uch term [return information] does not include data in a form which cannot be associated with, or otherwise identify, directly, or indirectly, a taxpayer.

[10] The majority's concern that a combination of specific items from taxpayers with geographic identification could reveal taxpayer indentities, 792 F.2d at 158, has been easily solved by IRS. The agency simply deletes geographic identifiers pursuant to §6103(b)(2) when the combination of data might reveal taxpayers' identities. The tax models, for instance, do not contain identification of small geographic areas.

Senator Haskell's explanation for this amendment is given substantial weight because he was its sponsor. *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976). He explained that continued disclosure of IRS "tax models" was one reason for this amendment (122 Cong. Rec. 24,012 (July 27, 1976)):

> The purpose of this amendment is to insure that statistical studies and other compilations of data now prepared by the Internal Revenue Service and disclosed by it to outside parties will continue to be subject to disclosure to the extent allowed under present law. Thus the Internal Revenue Service can continue to release for research purposes statistical studies and compilations of data, *such as the tax model*, which do not identify individual taxpayers. (Emphasis added)

To understand Senator Haskell's remarks on the amendment to §6103(b)(2), it is essential to understand his specific reference to the "tax model."

B. ***The Significance of Senator Haskell's Reference to the Tax Model.***

The "tax models" are very important in the legislative history because they illustrate the type of individual tax information that Congress intended would be made available to the public without taxpayer identification. Senator Haskell's reference to continued release of materials "such as the tax model" demonstrates that Congress intended to permit disclosure of individual tax information so long as the identities of taxpayers are protected, without any requirement that the individual information be aggregated or "reformulated."

The IRS's tax models contain samples of actual individual taxpayers' returns without taxpayer identification. *Long v. BEA*, 646 F.2d 1310, 1320 n.4 (9th Cir. 1981). The tax models

"contain the figures from actual returns item-by-item." *Id.* The IRS has prepared numerous tax models "for different years, different geographic areas, and different types of taxpayer returns." *Id.* The models are thus not aggregated tabulations of data.

The computer tapes containing the redacted actual tax returns are called tax models because "they are statistical samples which can be 'blown up' . . . to represent the entire population." *Long v. BEA*, 646 F.2d at 1320 n.4. These tax models are used by IRS to formulate tax policy. *Id.* They allow a person "to simulate the administrative and revenue impact of tax law changes . . ." Estep and Sailer, Special Projects Section, Individual Branch, Statistics of Income Division, Internal Revenue Service, "General Description Booklet of 1980 Individual Tax Model File" (Feb. 1983), p. 1; Exhibit to ACLU-W's Motion to Amend Opinion.

The "tax model tapes are regularly made available to the public with taxpayers' identities deleted." *Long v. BEA*, 646 F.2d at 1320 n.4; Estep and Sailor, *supra*, "General Description Booklet of 1980 Individual Tax Model File," p. 1, Exhibit to ACLU-W's Motion to Amend Opinion. The IRS and the National Archives' Machine-Readable Records Division have sold and in 1983 still sold to the public computer tapes containing these samples of actual returns. *Id.* For instance, the National Archives' catalog stated (*Catalog of Machine-Readable Records in the National Archives of the U.S.* (1975) at 8):

> INDIVIDUAL TAX MODEL FILE
>
> *Coverage:* Approximately 90,000 individual income tax returns per year, 1966-72, for the United States.
>
> * * *
>
> The publication in this file uses a sample of IRS Forms 1040 and 1040A (income tax returns) filed each

year . . . Each subsample is called an Individual Tax Model file and is used both to simulate the administrative and revenue impact of any changes in the tax laws and to provide general statistical data.

Each record represents one return and contains standard data items from tax forms as well as certain information for internal processing purposes. Included in the latter category is a sample, an income group code, and an Internal Revenue District code that identifies the State in which the return was filed. The remaining items consist of standard tax form entries, including such information as sex, marital status, number of dependents at home and away from home, taxable income, dividends, interest paid and received, and a breakdown of deductions. Occupational codes are included on those returns filed by self-employed persons. Data fields such as social security number and document locator number, have been deleted to prevent identification of individual taxpayers.

Restrictions: None

Thus, the tax models which contain item-by-item data from actual individual returns are available to the public without taxpayer identification. Senator Haskell's reference to disclosure of the tax model shows that Congress provided for disclosure of individual tax data, not just aggregated data as claimed by the IRS in the court below.[11] IRS Appellee's Br. 29 and n. 17. The only requirement in §6103(b)(2) is that

[11] Throughout ten years of litigation over the meaning of the Haskell amendment the IRS has taken two inconsistent positions. If its opponent knows what the tax model is, the IRS maintains that the Haskell amendment was intended to "freeze the status quo" in 1976 by permitting "disclosure only of those records which, under IRS practices at the time, were being disclosed." *Long v. IRS, supra*, 596 F.2d at 368 n.4 and 367. The difficulty with this argument is that the Haskell amendment does not say that it is intended to codify 1976 IRS practices on release of records. Nor does it refer to any list showing what types of records the IRS released in 1976. This specificity is required for a withholding statute under 5 U.S.C. §552(b)(3).

If the IRS opponent does not know that the tax model contains individual data — a sample of actual item-by-item taxpayer returns — the IRS maintains that only aggregated data are disclosable. Thus, in *King v. IRS*, 688 F.2d 488, 491 (7th Cir. 1982), the IRS successfully convinced the court that tax data are disclosable only when there has been an "amalgamation with data from other taxpayers to form statistical tabulations or studies."

In the instant case the IRS initially argued its aggregated data interpretation. IRS Supp. Br. pp. 1, 4, 5 and n.4, 6, 9 and 11. Much to IRS embarrassment, the actual nature of the tax model was disclosed by *amicus*. 792 F.2d at 162-63 n.4. IRS retreated into its argument on codification of existing practices. *Id.* The interpretation adopted by the majority — that the amendment allows only release of individual data that (a) have been reformulated and (b) are not indentifiable — has never been argued by IRS.

identifying information be deleted, as the IRS does when it releases the tax models.

III. The 1981 Amendment To §6103(b)(2) And Its Legislative History Show That Congress Approved The Judicial Interpretation That Allowed Disclosure Of Individual Tax Data In Anonymous Form.

When Congress amends a provision of a law and in the process expresses its acceptance of a prior judicial interpretation, that interpretation becomes the legislative intent of Congress and is followed by the courts. *Bob Jones University v. U.S.*, 461 U.S. 574, 601-02 (1983).[12] In this case, after

[12] The principle that subsequent legislation can clarify the intent of prior legislation is an ancient one. *Alexander v. The Mayor Etc. of Alexandria*, 5 Cranch 1, 7-8 (1809) (Opinion by Chief Justice Marshall). The principle has been applied on many occasions. See, *e.g.*, *U.S. v. Freeman*, 3 How. 556, 564-65 (1845); *Stockdale v. The Insurance Companies*, 20 Wall. 323, 331 (1874); *U.S. v. Hutchinson*, 312 U.S. 227; 236-37 (1940).

§6103(b)(2) was construed by the courts to allow release of nonidentifiable individual tax data, Congress amended the section to add an additional restriction on disclosure of certain IRS data, while explicitly approving the Ninth Circuit's general construction of the section.

In 1981 Congress amended §6103(b)(2) in Section 701 of the Economic Recovery Tax Act (ERTA). Pub.L. No. 97-34, 95 Stat. 340 (1981). The ERTA amendment added a provision restricting release of audit criteria and tax data used in development of audit selection criteria.[13]

At the time of the 1981 amendment, the only appellate decisions on §6103(b)(2) held that it permits disclosure of individual tax data that do not identify specific taxpayers. *Long v. IRS*, 596 F.2d 362 (9th Cir. 1979); *Neufeld v. IRS*, 646 F.2d 661 (D.C. Cir. 1981); *Long v. BEA*, 646 F.2d 1310 (9th Cir. 1981). The House Report on the ERTA amendment to §6103(b)(2) expressly refers to the two Ninth Circuit *Long* decisions and describes their interpretation of §6103(b)(2). H.Rep. No. 201, 97th Cong., lst Sess. 238-39 and n. 2 (July 24, 1981).[14]

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[13] The text of the amendment added beneath the Haskell amendment is emphasized below:

> but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. *Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.* (Emphasis added.)

[14] H.R. No. 201 states (at 238-39):

> The [Ninth Circuit in *Long v. IRS*] reversed a district court decision denying plaintiff-appellants access to this TCMP data from which the characteristics used to identify particular taxpayers had been deleted. The court based its decision on section §6103(b)(2), which excludes from the definition of protected return information "data in a form which cannot be associated with, or otherwise identify, directly, or indirectly, a particular taxpayer."

The ERTA Conference Report explained that Congress approved the general reasoning of the *Long* decisions, while it wished to modify the disclosure rules to provide an exemption for certain audit criteria (H. Rep. No. 97-215, 97th Cong., lst Sess. 264 (Aug. 1, 1981), *reprinted in* 1981 U.S. Code Cong. & Ad. News 105, 285, 352-53):

> Present law restricts the disclosure of tax returns and return information. *However, information that cannot identify any particular taxpayer is not protected under the disclosure restrictions.* Because of this questions have been raised concerning whether the IRS can legally refuse to disclose information which is used to develop standards for auditing tax returns.
>
> The House Bill provides that nothing in the tax law, or in any other Federal law, will be construed to require the disclosure of standards used, or to be used, for the selection of returns for examination . . . , if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws. However, *it is intended that nothing in this provision be construed to limit disclosure of statistical data or other information . . . to the extent permitted under present law. Thus any information that is currently made available will continue to be available.* (Emphasis added.)

Congress thus showed its intent that nonidentifiable individual tax data would continue to be disclosed, confirming its approval of the general interpretation of §6103(b)(2) in *Long v. IRS*.

Since Congress in 1981 showed its understanding of the existing judicial interpretation of §6103(b)(2), and it expressly approved this interpretation while amending the provision in another way, the *Long* interpretation was adopted by Congress as the meaning of the statute. *Bob Jones Univ.*, 461 U.S. at 601-02.

IV. Denial Of Access To Nonidentifiable Tax Information That The IRS Has Not Chosen To Reformulate Would Deprive The Public of Many Important Records on Tax Policy And Agency Practices.

If individual tax information is no longer available in nonidentifiable form, much important information formerly available from the IRS will no longer be available. Therefore, if the Court adopts either the majority's view that only information reformulated by IRS is disclosable or the IRS position that only aggregated data are disclosable, the public will be denied access to many kinds of records that were publicly available, both before and after the 1976 amendments to §6103.

For example, IRS documents revealing any future recurrence of the illegal practice of auditing political opponents of the White House would not be available under the FOIA, even after deletion of taxpayer identities, because the records concern audits of individuals. The documents would be "return information" as defined in §6103(b)(2) because the records pertain to determinations of taxpayer liability. The documents would thus not be available unless the IRS chose to reformulate or aggregate the data, even if taxpayer identities were deleted.

Information relating to specific nonidentifiable tax returns was disclosed in tax policy discussions prior to 1976 and should continue to be disclosed. For example, the Treasury

Department, in a 1975 publication on Tax Reform Studies and Proposals, p. 89, cited examples "drawn from actual tax returns." The actual examples "were chosen to make more concrete the implications of the aggregate data" reflected on tables.[15] Similarly, the House Ways and Means Committee, in the course of considering the bill that became the 1976 Tax Reform Act, heard about 37 actual, but unidentified, cases of persons who had high incomes but paid little or no income tax because of various tax shelters. *New York Times*, Sept. 4, 1975, p. 1, col. 2. These actual case illustrations are much more easily understood and more usable in policy debates than aggregated data on classes of taxpayers.

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[15] Case 8 was described as follows (p. 93):

Taxpayer with total income over $900,000 with more than $800,000 of excess percentage depletion

Adjusted gross income	$ 49,220
Amended gross income	924,722
Salary	50,000
Dividend	1,022,312
Interest	676
Capital gains (100 percent)	26,519
Farm profit	10,683
Oil and gas operations before excess percentage depletion	-185,468
Excess percentage depletion	862,042
Total personal deductions	41,141
Contributions	9,964
Interest	0
Taxes	4,112
Medical	2,902
Other	24,163
Taxable income	3,980
Tax after credits	397
Tax as a percentage of amended gross income	0.04
Tax as a percentage of amended taxable income	0.04
Income level at which a single individual would pay $397 in tax	3,400

In *Neufeld v. IRS*, 646 F.2d 661 (D.C. Cir. 1981), the IRS was required to release anonymous tax information to Professor John Neufeld of the University of North Carolina. The records included correspondence on tax policy between IRS and members of Congress. The letters referred to particular taxpayers and the IRS would not disclose them, but the D.C. Circuit ordered disclosure after deletion of all identifying information. *Id.* at 665.

The 1979 GAO report on IRS audit quality, quoted in footnote 7, *supra*, would no longer be available to the public because it contains specific unidentified examples of IRS audit mistakes. The GAO is covered by a provision, §6103(i)(7), that is nearly identical to §6103(b)(2). Under the reasoning of the court of appeals, this report would be entirely nondisclosable because there is apparently no duty to delete the case illustrations and disclose the remainder. 792 F.2d at 151-52 (panel opinion).

Scholars, policy analysts and government agencies find that research with administratively collected individual data, such as the tax microdata[16] used by IRS, to be very important (Office of Federal Statistical Policy and Standards, U.S. Dep't of Commerce, *Statistical Policy Working Paper 2* 23 (1978):

> Release of microdata . . . can serve legitimate and important public purposes in that the data may be useful for many more tabulations or other analyses than the originating agency is prepared to provide. Certain statistical applications (e.g., simulation models) require input in microdata form. * * *
>
> Microdata is a particularly popular form of release since it gives the user considerable flexibility in his or her analyses.

[16] "Microdata" is defined at footnote 3, *supra*.

Disclosure of microdata to outside researchers benefits not only the scholarly community, but the government as well. Disclosure increases the "number of researchers working on problems" and permits "exploration of promising new areas of knowledge." L. Alexander and T. Jabine, "Access to Social Security Microdata Files for Research and Statistical Purposes," 41 *Social Security Bulletin* 3, 5 (Aug., 1978). Feedback from outside researchers helps an agency to "develop new techniques, broaden its perspectives, and improve the quality of its own research data bases." *Id.*

Samples of individual IRS tax data, as opposed to tabulations of data, are of substantial value for research. *Long v. IRS*, 596 F.2d 362, 369 (9th Cir. 1979). In *Long*, the IRS was required to disclose deleted individual data from surveys of taxpayer compliance ("TCMP").[17] The TCMP data are being used by Professor Susan Long of Syracuse University to examine tax code complexity as a cause of taxpayers' errors on returns. This study contrasts with prior work that generally focuses on fear of enforcement, or lack thereof, as the determinative factor in taxpayer compliance.[18] Studies of this type should not be precluded by denying disclosure of anonymous individual data.

Moreover, if only reformulated data were disclosable in the future, tax models from prior years (1980 and before) would no longer be disclosable. It would no longer be possible to compare say, 1980 tax model data with 1980 data from other

[17] Although a significant portion of the TCMP data (about 65%) has been disclosed by IRS to date, the disclosability of other portions remains in dispute in an appeal currently pending before the Ninth Circuit.

[18] The type of study being performed by Professor Long was suggested by the GAO. Comptroller General, "How the IRS Selects Individual Income Tax Returns for Audit," GGD-76-55 (Nov. 5, 1976), pp. 51-53.

sources, such as Census data. *Cf.* Office of Federal Statistical Policy and Standards, U.S. Dep't of Commerce, *Statistical Policy Working Paper 5* 19-21 (June, 1980). This would be quite harmful to research on economics and tax policy.

Thus, individual tax data in anonymous form are important for public and legislative use, scholarly research and policymaking and have been disclosed since before the 1976 amendment. If the data must now be "reformulated" as well as anonymous to be disclosable, release could depend entirely on whether the IRS chooses to reformulate the data. The "reformulation" test would thus prevent valuable uses of anonymous tax data that Congress wished to continue.

V. The IRS Should Not Be Allowed to Avoid Searching For Information Responsive To The Church's Request Simply Because It Is Found In Third-Party Case Files.

The majority *en banc* opinion states the Haskell amendment was considered because it bears upon the issue "whether certain files could reasonably be excluded from the search as containing only 'return information'." 792 F.2d at 155. The *en banc* opinion does not state how this statutory interpretation question affected the search issue, but the panel opinion indicates the IRS might be able to simply make a generic claim of exemption for all third-party case files without actually searching through them. 792 F.2d at 151-52.

One cannot know now the outcome on remand. The IRS may claim the files are exempt under §6103(c) and 5 U.S.C. §552(b)(7). 792 F.2d at 152-53. The IRS may also claim a generic §6103(b)(2) exemption for all third-party case files, as the Internal Revenue Manual suggests (MT 1272-149, adopted on April 9, 1985, quoted in part in the Statement of the Case, *supra* at 6). If this is permitted, the IRS will fail in its duty

under the FOIA to search for responsive records and release segregable non-exempt portions (*e.g.*, documents in third-party case files pertaining to the Church of Scientology of California which do not identify third-party subjects of the files).

The Haskell amendment provides that nonidentifiable third-party tax information in IRS files is not *per se* exempt from disclosure. Such nonidentifiable information should be disclosed when no other exemption provision in §6103 or the FOIA applies. Therefore, third-party tax information is not generically exempt from search and possible disclosure.[19] The IRS search for responsive materials should not be limited to the Church's own files and other files indexed by topics rather than third-party names.

CONCLUSION

For the foregoing reasons, *amici* request that the Court adopt the interpretation of §6103(b)(2) in *Long v. IRS*, 596 F.2d 362 (9th Cir. 1979), *cert. denied*, 446 U.S. 917 (1980).

Respectfully submitted this 27th day of April, 1987.

STEPHEN K. STRONG
Counsel of Record
DAVID F. STOBAUGH
BENDICH, STOBAUGH & STRONG
2111 Smith Tower
Seattle, WA 98104
(206) 622-3536

JOHN A. POWELL
DAVID B. GOLDSTEIN
American Civil Liberties Union Foundation
132 W. 43rd Street
New York, NY 10036
(212) 944-9800

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[19] Even under the majority's reformulation test the IRS should be required to search for information about third parties that has already been reformulated or aggregated. Moreover, as the majority noted, some IRS information is not return information at all. 792 F.2d at 151-52. Some such information might be found in files indexed under third parties' names, such as the files of other Scientology entities.